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Submitted

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~392.~~ 777

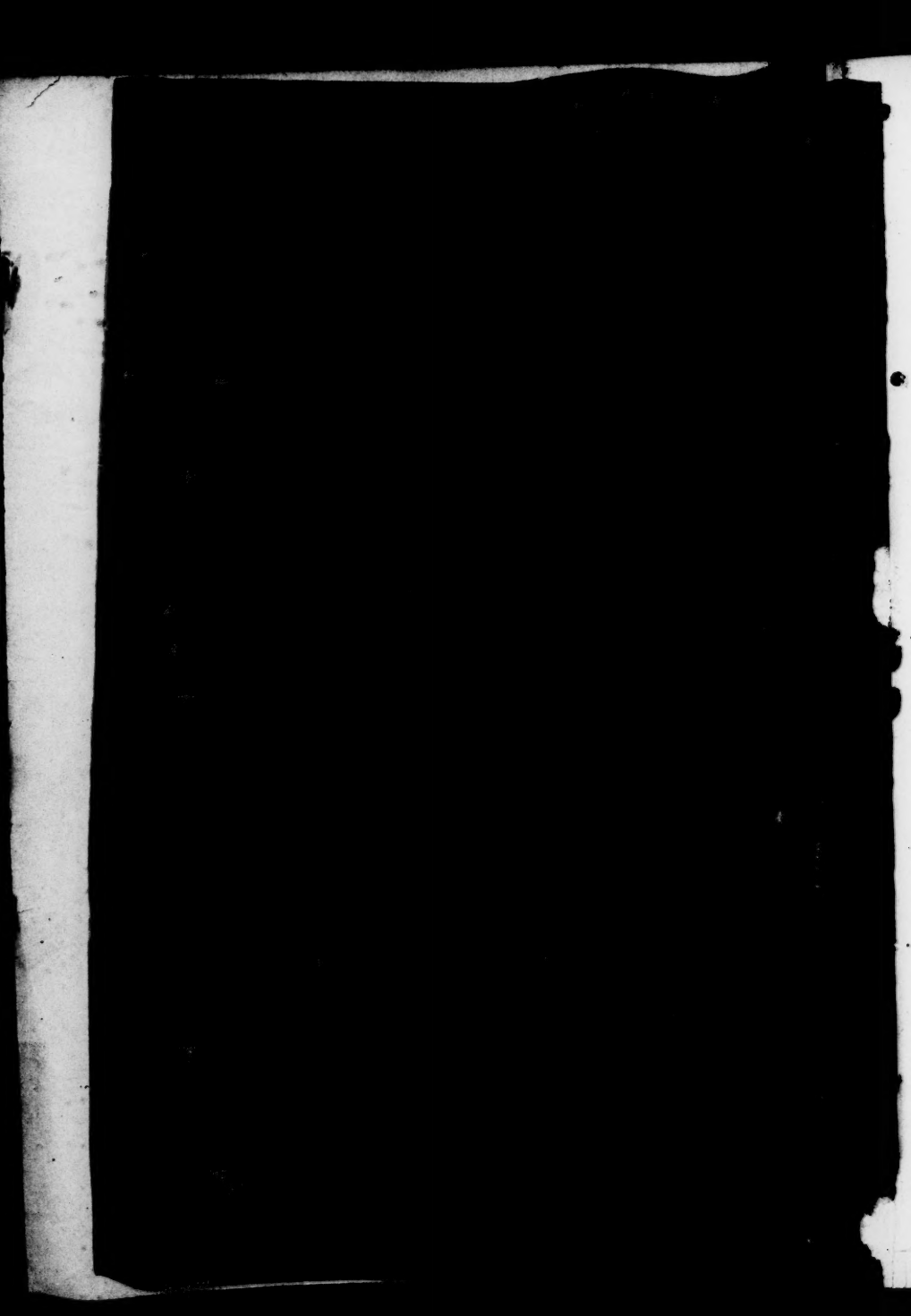
THOMAS H. ALLEN AND JAMES M. ALLEN, PARTNERS AS T. H. & J. M. ALLEN & COMPANY, PLAINTIFFS IN ERROR,

vs.

AUSTIN H. FERGUSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED JUNE 1, 1872.



# SUPREME COURT OF THE UNITED STATES.

## No. 392.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Thomas H. Allen and James M. Allen, partners under the style of T. H. & J. M. Allen & Company, and Austin H. Ferguson, a manifest error hath happened, to the great damage of the said T. H. & J. M. Allen & Company, as is said, and as appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 8th day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

[SEAL.] FRANK E. WRIGHT,
*Clerk of the Circuit Court of the United States of America, for the Eastern District of Arkansas.*

Allowed by—

HENRY C. CALDWELL,
*U. S. Dist. Judge East. Dist. Ark.*

The execution of this writ of error appears by the schedule hereto annexed.

FRANK E. WRIGHT, *Clerk.*

(Indorsed:) Writ of error. Filed May 8, '72. Frank E. Wright, clerk.

2 Be it remembered that, on the tenth day of March, A. D. 1871, came into the clerk's office of the circuit court of the United States for the eastern district of Arkansas, T. H. and J. M. Allen & Co., by Messrs. Garland and Nash, their attorneys, and filed therein their declaration in assumpsit against Austin H. Ferguson; which is in the words and figures following, to wit:

In the United States circuit court, eastern district of Arkansas. April term, A. D. 1871.

Thomas H. Allen, who is a resident and citizen of the State of Tennessee; James M. Allen, who is a resident and citizen of the State of Louisiana; and Perry Nugent, who is a resident and citizen of said State of Louisiana, partners under the name and style of T. H. and J. M. Allen and Company, complain of Austin H. Ferguson, who is a

resident and citizen of the said eastern district of Arkansas, in an action of assumpsit.

For that the said Ferguson, the defendant herein, on the 20th
3 day of March, 1867, at, to wit, the eastern district aforesaid, made his promissory note in writing, in his style of A. H. Ferguson, and delivered the same to the said T. H. and J. M. Allen and Company, plaintiffs herein, and thereby promised to pay to the order of the said T. H. and J. M. Allen and Company, at their counting-room, in New Orleans, La., the sum of thirty-eight hundred and sixty-four dollars and fifty-eight cents, ($3,864.58,) with interest thereon from maturity, till paid, at the rate of eight per centum per annum, one day after the date of said note. A true copy of said note is attached hereto and filed herewith.

Yet, although the time in which said defendant promised to pay said note has long since elapsed, and he has been often requested to pay the same, with the interest thereon, he has wholly neglected and refused to pay either said note or the interest thereon, or any part of either, but said note, with the interest thereon remains, wholly due and unpaid, to the damage of plaintiffs six thousand dollars, ($6,000.00;) and therefore they sue.

GARLAND & NASH,
*For Pl'ffs.*

4 The following is a true copy of the note sued on above, viz:

"$3,864.58.] CROCKETT'S BLUFF, ARK., *March 20th*, 1867.

"One day after date, I promise to pay to the order of T. H. and J. M. Allen & Co., at their counting-room, in New Orleans, La., thirty-eight hundred and sixty-four $\frac{58}{100}$ dollars, for value received, with interest at the rate of eight per cent. from maturity, till paid.

(Signed) "A. H. FERGUSON."

[U. S. rev. stamp.]

GARLAND & NASH,
*Att'ys for Pl'ffs.*

I, A. H. Garland, acknowledge myself security for all the costs that may accrue in the above suit, March 10, '71.

A. H. GARLAND.

Filed and writ issued March 10, 1871.

FRANK E. WRIGHT, *Clerk.*

5 UNITED STATES OF AMERICA,
*Eastern District of Arkansas:*

Be it remembered that, at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 10th day of April, anno Domini one thousand eight hundred and seventy-one, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding, and holding said court, the following proceedings were had, to wit:

And on April 17th, A. D. 1871, as follows:

T. H. & J. M. ALLEN
*vs.*
AUSTIN H. FERGUSON. } Assumpsit.

Come the plaintiffs, by Garland and Nash, their attorneys, and on

their motion it is ordered that this cause be continued, and that an alias writ issue herein.

And, on June 21, A. D. 1871, the clerk of said court issued an alias writ of summons, which is in the words and figures following, to wit:

6 UNITED STATES OF AMERICA,
*Eastern District of Arkansas:*

The president of the United States to the marshal of the eastern district of Arkansas, greeting:

You are hereby commanded to summon Austin H. Ferguson, who is a citizen of the State of Arkansas, defendant herein, if he be found within your district, to appear before the judges of the circuit court of the United States, in and for the eastern district of Arkansas, at the United States court-room, in the city of Little Rock, on the first day of our next October term, 1871, to answer Thomas H. Allen, who is a citizen of the State of Tennessee; James M. Allen, who is a citizen of the State of Louisiana; and Perry Nugent, who is a citizen of Louisiana, partners under the style of T. H. & J. M. Allen & Co., plaintiffs herein, in an action of assumpsit, to the damage of plaintiff, six thousand dollars, (6,000,) and have you then and there this writ with the manner of execution hereof indorsed hereon.

In testimony whereof Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, has caused the seal of said circuit court to be hereunto affixed this 21 day of June, A. D. 1871, and on the 95 year of our Independence.

Attest:

[L. S.] FRANK E. WRIGHT, *Clerk.*

7 Which writ is endorsed as follows, to wit:

In obedience to the within writ, I have summoned the within-named Austin H. Ferguson, by reading the same to him in his presence and hearing, at De Witt, in the eastern district of Arkansas, on this 28th day of August, A. D. 1871.

ISAAC C. MILLS,
*U. S. Marshal for East Dist. Ark's,*
By H. C. LOUTHALL,
*Spec. Dep'ty Marshal.*

Returned and filed September 14, 1871.

FRANK E. WRIGHT, *Clerk.*

8 UNITED STATES OF AMERICA,
*Eastern District of Arkansas:*

Be it remembered that, at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 9th day of October, anno Domini one thousand eight hundred and seventy-one, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable John F. Dillon, judge of the circuit court of the United States for the 8th judicial circuit, presiding, & Hon. Henry C. Caldwell, district judge, and holding said court, the following proceedings were had, to wit:

T. H. & J. M. ALLEN
*vs.*
AUSTIN H. FERGUSON. } Assumpsit.

Comes the defendant, by Clark and Williams, his attorneys, and, by

consent, enters in short upon the record here his plea of discharge in bankruptcy.

Record signed, JNO. F. DILLON,
HENRY C. CALDWELL.

And on October 10th, A. D. 1871, as follows:

T. H. & J. M. ALLEN
*vs.*
A. H. FERGUSON.

Come the plaintiffs, by A. H. Garland, esq., their attorney, and
9 file herein their replication to defendant's plea of bankruptcy; which replication is in the words and figures following, to wit:

In the United States circuit court, October term A. D. 1871, eastern district of Ark's.

ALLEN & CO., PLFF'S,
*vs.*
AUSTIN H. FERGUSON, DEF'T.

Come said plaintiffs and say that they ought not to be barred of their said action by reason of anything contained in said defendant's plea herein, because they say that, heretofore, at the said district, on the seventh day of January, A. D. 1868, before the said Ferguson, received his said discharge in bankruptcy, and while his petition was pending for such proceedings as would discharge him, he, the said defendant made a new promise in writing to said plaintiffs, whereby he undertook and agreed to pay them the said debt named in said declaration
10 herein, and plaintiffs received said promise in writing, and relying upon the same made no efforts to collect their said debt, but they have demanded the same of said defendant upon the faith of said new promise in writing, but he has wholly failed to pay the same or any part thereof, and now refuses so to do. Said promise in writing is herewith filed as part hereof, Exhibit A, and this, &c., wherefore &c.

GARLAND, *for Plff's.*

*Exhibit A to plea.*

CROCKETT'S BLUFF, ARK., *Jan.* 7th, 1868.

Messrs. THO'S. H. ALLEN & COM.

DEAR SIR: I avail myself of this opportunity, to give you a fare statement of my pecuniary affa'res. Fi'st, I failed to make a crop; secondly, find myself involved as security to the amount of five or eight thousand dollars; was sued and ju'gments was render'd against me at the last turm of our co'rt for about four thousand dollars, a sum
11 suf'ic'ent to sell all the avai'ble property that I am in possession of. I also lost about three thousand dollars by persons takeing the bankrupt-law. This is my situation. I was, as you can re'dily conclude, in a bad fix. To remain as I was at that time, my property would be sold to pay security debts, and my just creditors would not get any part of it, and that I would be redused to insolvency, and still ju'gments against me. As a last resort concluded to render a skedule myself in order to forse a *prorater* division of my affects. The five bales cotton I shipt you was all my crop, to pay you for the meat that you had

sent me, to enable me to make the little crop that I did make. The cash that I requested you to send me, was for myself and William F. Ferguson, to pay his hands for labor; and one hundred and fifty yards of the bag'in', was for W. F. Ferguson, and one bar'el of the salt. I have been absent from home for the last two weeks; got home last night, and has not seen him yet, but suppose he has shipt you some cotton.

12 If he has not done so, I will see that he sends you cotton at once, Be satisfy'd; all will be right. I intend to pay all my just debts, if money can be made out of hierd labor. Security debt I cannot pay. I shall have a hard time, I suppose, this se'son, but will do the best I can.

JAN. 8.—Since the above was writ'en, I have seen William Ferguson. He says he ship'ed you two bales cotton, ten or twelve days ago, and ship'ed in my name, as the baggin' was order'd by me for him. William Ferguson will be in Memphis betwixt this and the first of March, and will call and see you on bisness matters betwixt me and you'self. All will be right betwixt me and my just creditors. Don't think hard of me. Attribet my poverty to the unprincipel'd Yankey. Let me heare from you as usel.

Yours, very respectfully,

A. H. FERGUSON.

Filed October 10, 1871.

FRANK E. WRIGHT, *Clerk.*

13 And on October 16th, A. D. 1871, as follows:

T. H. & J. M. ALLEN
*vs.*
AUSTIN H. FERGUSON.

Come the plaintiffs, by Garland and Nash, their attorneys, and comes the defendant, by Clark and Williams, his attorneys, and by consent this cause is continued.

(Record signed) HENRY C. CALDWELL.

14 UNITED STATES OF AMERICA,
*Eastern District of Arkansas:*

Be it remembered that, at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 8th day of April, anno Domini one thousand eight hundred and seventy-two, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on April 12th, A. D. 1872, as follows:

T. H. & J. M. ALLEN
*vs.*
AUSTIN H. FERGUSON.

And now comes the said defendant, by Clark & Williams, his attorneys, and demurs to the plaintiffs' replication to defendant's plea of bankruptcy; which demurrer is by consent taken in short upon the record, and the same is submitted to the court, and the court, being now

well and sufficiently advised thereof, doth sustain said demurrer; and plaintiffs, having nothing further to say, but resting upon their said replication, it is considered and adjudged that plaintiffs take nothing by their said suit, and defendant go hence without day; and plaintiffs pay all the costs herein.

(Record signed) HENRY C. CALDWELL,
*Dist. Judge.*

15 And on May 13th, A. D. 1872, came into the clerk's office said plaintiffs, by A. H. Garland, esq., their attorney, and filed therein a citation, which is in the words and figures following, to wit:

By the Honorable Henry C. Caldwell, one of the judges of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit.

To AUSTIN H. FERGUSON:

Whereas lately issued out of the circuit court of the United States in and for the eastern district of Arkansas a writ of error, directed to the judge of the circuit court of the United States for the eastern district of Arkansas, stating that, in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judge thereof, between Thomas H. and James M. Allen, under the style of T. H. and J. M. Allen and Company, and Austin H. Ferguson, a manifest error hath happened, to the great damage of the said T. H. & J. M. Allen & Co.

16 And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the first Monday of December next, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Little Rock, in the eastern district of Arkansas, in the eighth circuit, the eighth day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

HENRY C. CALDWELL, [SEAL.]
*U. S. Dist. Judge, East. Dist. Ark's.*

We acknowledge service of this citation this the 13th May, 1872.
CLARK & WILLIAMS,
*For Ferguson.*

Filed May 13, 1872.
FRANK E. WRIGHT, *Clerk.*

17 UNITED STATES OF AMERICA,
*Eastern District of Arkansas:*

I, Frank E. Wright, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of their originals on file and remaining of record in my office, and constitute a complete transcript of the record-entries and papers in the case of T. H. & J. M. Allen against Austin H. Ferguson, in said circuit court.

In witness whereof I have hereunto set my hand and the seal of said court, this 20th day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States of America the ninety-sixth.

Attest: [SEAL.] FRANK E. WRIGHT, *Clerk.*

The costs of transcript, $5.75, paid by A. H. Garland, esq., May 20, 1872.

FRANK E. WRIGHT, *Clerk.*

(Indorsed on cover:) No. 392. Thomas H. Allen and James M. Allen, partners as T. H. & J. M. Allen & Company, plaintiffs in error, vs. Austin H. Ferguson. E. Arkansas C. C. U. S. Filed 1st of June, 1872.

# Supreme Court of the United States.

OCTOBER TERM, 1873.

THOMAS H. ALLEN ET AL., *plaintiffs in error*,
*vs.*
AUSTIN H. FERGUSON, *defendant in error*. } No.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR PLAINTIFFS.

The plaintiffs sued defendant in the court below upon an instrument in the words and figures following:

"$3,864.58.] CROCKETT'S BLUFF, ARK.,
"*March 20th*, 1867.

"One day after date, I promise to pay to the order of T. H. and J. M. Allen & Co., at their counting-room, in New Orleans, La., thirty-eight hundred and sixty-four $\frac{58}{100}$ dollars, for value received, with interest at the rate of eight per cent. from maturity, till paid.

(Signed) "A. H. FERGUSON."

[U. S. rev. stamp.]

At the return term, Ferguson appeared and pleaded his discharge in bankruptcy, which was, by consent, entered in short on the record. (*Trans.*, p. 3, 4.) Plaintiffs, raising no question as to the sufficiency of the plea to avoid it, filed a replication in the words and figures following: (*Trans.*, pp. 4, 5:)

"In the United States circuit court, October term A. D. 1871, eastern district of Ark's.

"ALLEN & Co., *plff's*,
*vs.*
"A. H. FERGUSON, *def't.*

"Come said plaintiffs and say that they ought not to be barred of their said action by reason of anything contained in said defendant's plea herein, because they say that heretofore, at the said district, on the seventh day of January, A. D. 1868, before the said Ferguson received his said discharge in bankruptcy, and while his petition was pending for such proceedings as would discharge him, he, the said defendant, made a new promise in writing to said plaintiffs, whereby he undertook and agreed to pay them the said debt named in said declaration herein, and plaintiffs received said promise in writing, and relying upon the same, made no efforts to collect their said debt, but they have demanded the same of said defendant upon the faith of said new promise in writing, but he has wholly failed to pay the same or any part thereof, and now refuses so to do. Said promise in writing is herewith filed as part hereof, Exhibit A, and this, &c., wherefore &c.

"GARLAND, *for Plff's.*

"*Exhibit A to plea.*

"CROCKETT'S BLUFF, ARK., *Jan. 7th*, 1868.

"Messrs. THO'S. H. ALLEN & COM.

"DEAR SIR: I avail myself of this opportunity, to give you a fare statement of my pecuniary affa'res. Fi'st, I failed to make a crop; secondly, find myself involved as security to the amount of five or eight thousand dollars; was sued and ju'gments was render'd against me at the last turm of our co'rt for about four thousand dollars, a sum suf'ic'ent to sell all the avai'ble property that I am in possession of. I also lost about three thousand dollars by persons takeing the bankrupt-law. This is my situation. I was, as you can re'dily conclude, in a bad fix. To re-

main as I was at that time, my property would be sold to pay security debts, and my just creditors would not get any part of it, and that I would be reduced to insolvency, and still ju'gments against me. As a last resort concluded to render a skedule myself in order to forse a *prorater* division of my affects. The five bales cotton I shipt you was all my crop, to pay you for the meat that you had sent me, to enable me to make the little crop that I did make. The cash that I requested you to send me, was for myself and William F. Ferguson, to pay his hands for labor; and one hundred and fifty yards of the bag'in', was for W. F. Ferguson, and one bar'el of the salt. I have been absent from home for the last two weeks; got home last night, and has not sean him yet, but suppose he has shipt you some cotton. If he has not done so, I will see that he sends you cotton at once. Be satisfy'd; all will be right. I intend to pay all my just debts, if money can be made out of hierd labor. Security debt I cannot pay. I shall have a hard time, I suppose, this se'son, but will do the best I can.

"JAN. 8.—Since the above was writ'en, I have sean William Ferguson. He says he ship'ed you two bales cotton, ten or twelve days ago, and ship'ed in my name, as the baggin' was order'd by me for him. William Ferguson will be in Memphis betwixt this and the first of March, and will call and see you on bisness matters betwixt me and you'self. All will be right betwixt me and my just creditors. Don't think hard of me. Attribet my poverty to the unprincipel'd Yankey. Let me heare from you as usel. Yours, very respectfully,

"A. H. FERGUSON."

To this replication defendant demurred and the court sustained the demurrer, and plaintiffs rested; and judgment being rendered against them, they brought the case to this court by writ of error.

The court below ~~ended~~ erred in sustaining the demurrer to the replication.

The direct proposition is, the letter of Ferguson, attached to and a part of the replication, is a sufficient promise to bind him to pay the debt, notwithstanding the proceedings had by him in bankruptcy.

It does not matter whether the new promise was made during the pendency of the bankrupt proceedings or after the discharge was granted, as the discharge, when granted, relates back to and operates from the day of filing the petition for the benefit of bankruptcy. That a new promise, made at one or the other of the times named, is sufficient to give the debt vitality, and preserve it as an obligation existing against the party making it, there is no question. (*Chitty's Cont.*, 47, *notes m and* 3; 1 *Parsons's Cont.*, 381; 5 *Eng.*—10 *Arks.*—381; *Apperson* v. *Stewart*, 27 *Arks.*, 619.)

The only inquiry presented here is, is there such a promise as comes within the meaning of a *new promise?* It is not necessary at all that the instrument should have an express promise in it, nor is it necessary it should be in the form of a note or bond, but it is sufficient if from it can be gathered a recognition of the debt as an obligation, and an intention on the part of the person sought to be charged to pay it. (*Authorities already cited; Maxim* v. *Morse*, 8 *Mass.*, 127; *Shippey* v. *Henderson*, 14 *Johns.*, 178; *Depuy* v. *Swart*, 3 *Wend.*, 135.

That this letter (*Exhibit A*) to the replication comes directly within this rule there can be no kind of dispute.

Why does Ferguson give plaintiffs a statement of his pecuniary affairs, if he does not feel himself in debt to them? He does it as a debtor naturally would who felt he ought to pay his debt, and who intended to do it. The statement is minute as to his (F.'s) troubles and reverses, and he says he ordered cotton to be sent plaintiffs, and if not sent already, he will see that it is forwarded. Not content with this avowal, F. still goes on in more explicit terms, and tells plaintiffs to *be satisfied, all will be right.* When F. tells plaintiffs to be satisfied, he could have meant nothing else than to be easy, their debt should be paid, for that was all there was for them to be satisfied about, so far as he was

concerned. And when he says *all will be right*, if meaning it has, it is his debt to them should be paid, for there was nothing else between them to be righted but this debt, and short of payment, in law, that could not be righted. The word *right* in this letter must be construed in reference to this debt only, as it was this that called forth the letter. Then he promises flatly to pay all his just debts, but not security debts. This debt is recognized in his letter as not a security debt, and as a just debt. Legally this is as strong a document to bind F. as if he had expressed it in the same language of the original note; and, if possible, it is stronger, for he confesses their kindness to him, and pleads excuses for his failing to meet this just claim, and commits himself still to its payment.

But this is not all. In another part of the letter, a kind of *P. S.*, he repeats *all will be right between him and his just creditors*, and requests plaintiffs not to think hard of him. It would be difficult to find a more direct expression of a sense of existing obligation, and an intention to pay it, than is here set forth. Plaintiffs are just creditors of F., and *all will be right* with such as these; how and when right? When their debts are paid, and not till then. It cannot mean all will be right with them a hundred years hence, or at the great final accounting and settling of all things.

What was the natural impression produced on the mind of plaintiffs by this letter? Of course that F. acknowledged the debt and intended to pay it, and plaintiffs therefore would not contest his bankruptcy, but would wait and rest upon this promise. Now that they have done this, the law will not permit them to be defrauded by F.'s promise, simply because it is not couched in more appropriate language, or because it is not squared off exactly in the shape of a promissory note. To permit this would be no better than spelling plaintiffs out of their rights. By an examination of the different cases reported, the court will scarcely find one containing a more direct promise than is shown here. It does not rest merely upon an acknowledgment of the debt, as many authorities hold to be sufficient, but it rests

upon that, and also a declaration to *right* it up, and that means payment or nothing.

Light may be thrown upon this question by reference to adjudications as to new promises sufficient to revive a debt barred by limitation. All expressions of *the debt shall be adjusted; the debt will be settled; the matter shall be arranged; all will be right;* &c., are held sufficient to revive a debt barred by limitation. (22 *Arks.*, 290; 18 *Ib.*, 522; 1 *Peters*, 357; 32 *Miss.*, 257; 4 *Humph.*, 183; *Angell Lim.*, (3d edition,) 230–234; *In the matter of Harden*, 1 *Bk. Req.*, 97, 98.) And if the expressions used by Ferguson are not stronger than any of these, then there is no meaning in his letter at all.

The letter of Mr. Ferguson, as to his just creditors, among whom are the plaintiffs, is that of an honest man, who, it has been said, occupies a very exalted place in the works of creation; but F.'s plea, put in doubtless for form's sake and to repel any presumption of fraud in his bankrupt proceedings, if sustained, will place him in a bad, if not a false attitude, not only before his just creditors, but before those who, he says, caused his poverty, if not the public at large.

GARLAND,
*For Plaintiffs.*

# ARGUMENT FOR DEFENDANT IN ERROR.

## SUPREME COURT OF THE UNITED STATES.

No. 177.

THOMAS H. ALLEN AND JAMES M. ALLEN, PARTNERS, AS T. H. & J. M. ALLEN & COMPANY, PLAINTIFFS IN ERROR,

vs.

AUSTIN H. FERGUSON, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

# IN THE SUPREME COURT of the UNITED STATES.

No. 177.

THOMAS H. ALLEN and
JAMES M. ALLEN, Partners,
As T. H. & J. M. ALLEN, Plaintiffs,
*vs.*
AUSTIN H. FERGUSON, Defendant.

Error to Circuit Court,
Eastern District of Ark.

## ARGUMENT FOR DEFENDANT.

On the 10th of March, 1871, plaintiffs, who are citizens of Tennessee, filed their declaration in assumpsit in the clerk's office of the Circuit Court of the United States for the Eastern District of Arkansas, in which they claim from A. H. Ferguson, who is a citizen of Arkansas, the sum of three thousand eight hundred and sixty-four dollars and fifty-eight cents, counting upon a promissory note described in the declaration. (See transcript, pages 1 and 2.) Under rule number one of said Court a copy of note was filed. (See transcript, page 2.) The said rule of practice number one of said Court, under which the same was filed is in words and figures following, to wit: (Adopted April term, 1868.) 1. When a pleading of either party is founded upon a written instrument or account, a copy thereof must be annexed to such pleading, and oyer of the instrument filed shall not be further craved or granted without special leave of the court for cause shown. (See 1 Dillon's C. C. Rep., 591, Appendix.)

On the 9th day of October, 1871, the defendant appeared before said court in obedience to process, and by consent entered in short, upon the record his plea of discharge in bankruptcy. (See transcript, page 3.) To which plaintiffs filed their replication in words and figures following, to wit:

ALLEN & CO., Plaintiffs.

*vs.*

AUSTIN H. FERGUSON, Defendant.

Comes said plaintiffs and say that they ought not to be barred of their said action by reason of anything contained in said defendant's plea herein, because they say that heretofore, at the said district, on the seventh day of January, A. D. 1868, before the said Ferguson received his said discharge in bankruptcy, and while his petition was pending for such proceedings as would discharge him, he, the said defendant, made a new promise, in writing, to said plaintiffs, whereby he undertook and agreed to pay them the said debt named in said declaration herein, and plaintiffs received said promise in writing, and relying upon the same made no efforts to collect their said debt, but they have demanded the same of said defendant upon the faith of said new promise in writing, but he has wholly failed to pay the same or any part thereof, and now refuses so to do. Said promise in writing is herewith filed as part hereof. Exhibit A, and this &c., wherefore, &c.

GARLAND, for Plaintiff.

(See transcript, page 4)

Exhibit A to this replication, which was thus presented and made a part of the record under said rule of practice, in lieu of profert and oyer, is as follows:

CROCKETT'S BLUFF, ARK., Jan. 7th, 1868.

Messrs. THO'S ALLEN & COM.—

*Dear Sir:* I avail myself of this opportunity, to give you a *fare* statement of my pecuniary *affares*. Fi'st, I failed to make a crop; secondly, find myself involved as security to the amount of five or eight thousand dollars; was sued and *ju'gments was* render'd against me at the last turm of our *co'rt* for about four thousand dollars, a sum suf'ic'ent to sell all the *ava'ble* property that I am in possession of. I also lost about three thousand dollars by persons

taking the bankrupt law. This is my situation. I was, as you can re'dily conclude, in a bad fix. To remain as I was at that time, my property would be sold to pay security debts, and my just creditors would not get any part of it, and that I would be redused to insolvency and still Ju'gments against me. As a last resort, concluded to render a skedule myself in order to forse a *pro rater* division of my affects. The five bales cotton I shipt you was all my crop to pay you for the meat that you had sent me to enable me to make the little crop that I did make. The cash that I requested you to send me, was for myself and William F. Ferguson, to pay his hands for labor; and one hundred and fifty yards of the *bag'in'* was for W. F. Ferguson, and one *bar'el* of the salt. I have been absent from home for the last two weeks—got home last night, and has not seen him yet, but suppose he has shipt you some cotton. If he has not done so, I will see that he sends you cotton at once; be satisfy'd, all will be right. I intend to pay all my just debts if money can be made out of hierd labor. Security debts I cannot pay. I shall have a hard time, I suppose, this se'son, but will do the best I can.

Jan. 8.—Since the above was writ'en, I have seen William Ferguson. He says he ship'ed you two bales cotton, ten or twelve days ago, and ship'ed in my name, as the baggin' was order'd by me for him. William Ferguson will be in Memphis betwixt this and the first of March and will call and see you on bisness matters betwixt me and you'self. All will be right betwixt me and my just creditors. Don't think hard of me. Attribet' my poverty to the unprincipel'd Yankey. Let me heare from you as usel.

Yours, very respectfully,

A. H. Ferguson.

(See transcript, pages 4 and 5.)

At the April term, 1872, to which the cause was continued, defendant demurred to this replication, which by consent was taken in short upon the record. This demurrer was by the court sustained, and plaintiffs declining to amend or further reply, judgment was rendered for defendant, and plaintiffs sued out the writ of error. (See transcript, page 6 )

Defendant contends that there is no error in the record of the proceedings of the Circuit Court of the United States for the Eastern District of Arkansas in this cause.

At common law the letter marked Exhibit A to plaintiff's replication would not be regarded as a part of the record, except profert were made of the same, and it was set out on oyer. This common law system of pleading obtained in said Circuit Court until his Honor Justice Miller, at Circuit, April, 1868, announced and promulgated the rule above copied. Ever since counsel in said court have exhibited, to all pleadings in every stage of a cause, all papers relied on, and court and counsel treat them as a part of the record, and we submit that this is a correct construction of the rule, which very materially improved the heavy common law machinery of profert and oyer.

In this cause the counsel upon either side and the court regarded Ferguson's letter exhibited as part of plaintiffs' replication, as forming part of the record, and the demurrer was regarded, argued, and held to reach not only the sufficiency of the allegations contained in it, but the sufficiency of the evidence contained in the exhibit to support it as well, and was to that extent a demurrer to evidence. We contend that this was proper for, waiving the question as to how far a new promise in parol might be a sufficient answer to the plea, it is clear that under the replication in this case, plaintiff having confined himself to the promise so-called, in writing, supposed to be contained in Ferguson's letter, is confined to the limits prescribed by himself, and after having said to defendant upon the record "here is your new promise," will not be allowed to surprise him by proving something else. If this be not so, then pleading, which is designed to apprise the opposite party of the nature of the case of his rival, is a fraud, and would only in practice enable the crafty the better to mask the witness whose testimony might be successfully contradicted or explained.

The demurrer is general; therefore nothing can arise as to questions of mere form, and all we must determine is the sufficiency of the replication, substantially, as an answer to the plea of discharge in bankruptcy.

The replication avers

That, "*before* the said Ferguson received his said discharge in bankruptcy, *and while* his *petition* was *pending* for such proceedings as would discharge him," &c., he made the promise.

This does not set out such new promise as the law recognizes as a sufficient answer to the plea. In England it is held, in the later

decisions, that a promise made after the fiat, but before discharge, does not revive the debt; because at that time the party is liable on the original debt, and can be sued. *Kirkpatrick vs. Tatersall*, 1 *Car. & Kir.*, 577; *Brix vs Braham*, 1 *Bing.*, 509.

In the United States it is held that it must appear that the party at the time of making the new promise was *decreed* a *bankrupt*, and a replication to a plea of discharge, after the presentation of the petition, and before suit commenced is bad. See *Steblin vs. Sherman*, 1 *Sandf.*, 510. The allegations of the replication are vague and indefinite as to what stage of the pendency of the "petition" for such proceeding as would discharge him, that this supposed promise was made; nor does the record disclose the time when the petition was filed, when the decree of bankruptcy was rendered, or when the final discharge was had. Having consented to a plea in short, the plaintiffs, by the rule, take it as well pleaded. If he had with like consent replied a new promise in short, we would have been in like manner bound to take it upon the proof only, but having, for the purpose of raising the whole question or demurrer, chosen to reply in full, plaintiffs are bound to show that we are precluded our plea. Now while we admit that a promise made after decree declaring defendant a bankrupt, but before discharge, would be binding, yet we contend upon the authority of the case above cited, from 1st Sandf., that it would not be good pending the petition *before decree*, and it devolved upon plaintiffs to aver and prove that fact, and they cannot take advantage of the uncertainty of their own pleading to claim that they meant something more than they say. Every pleading must be certain, at least, to a common intent, and is taken most strongly against the party pleading, as the pleader is supposed to know his case, and to make the best statement of it he is able. See 1 *Chitty's Pleadings*, 237, (marginal paging.)

Plaintiffs have utterly failed to show that at the time of making the supposed promise Ferguson was decreed a bankrupt, and in this respect the replication is substantially defective on its face. Nor does the concluding allegation, that relying upon this promise plaintiffs took no steps, &c., help the case, for if the promise was made as avered "pending the petition, &c.," and before decree declaring defendant bankrupt, as to which important fact the replication is silent, then it was not such a promise as gave plaintiffs any legal rights.

and they relied upon it at their peril, the moral questions, if any, are for another and higher forum.

Although there are authorities the other way, which sustain the plaintiffs in replying a new promise, yet the best considered cases hold that the old debt is a mere consideration, and the new promise is the real contract, and must be sued on. See *Carson vs. Osborn*, 10 *B., Mon.* 155; *Field's Case*, 2 *Rawle*, 351; *Graham vs. Hunt*, 8 *B., Monroe* 7.

We have said this much upon the naked question of law raised upon the replication. Finally, we submit that the paper exhibited with the replication does not show a new promise. Such promise, to be valid, must be express, clear and unequivocal. See *Hilliard on Bankruptcy, page* 265, *Chap. IX, sec.* 53; *Cambridge vs. Littlefield*, 6 *Cush.*, 213. The promise must show a deliberate intention on the part of the promiser to waive the protection of his discharge, and to rebind himself, *legally*, to pay the old debt. See *Horner vs. Speed*, 2 *P. & H.* (*Va.*,) 616; *Evans vs. Cacey*, 29, *Ala.*, 99, 31 *Maine*, 169; *Lynbury vs. Wrightman* 5 *Espenasse Rep.*, 198; *Fleming vs. Hayne*, 1 *Stark.* 370; *Mucklow St. Johns*, 4 *Taunton*, 613; *Brook vs. Wood*, 13 *Price*, 667; *Dupuy vs. Swart*, 3 *Wend.*, 139; *Alsop vs. Brown*, 1 *Doug.*, 192; *Prewett vs. Corruthers*, 12 *Smede & Marshall*, 491; *Brown vs. Collier*, 8 *Humph.*, 510; *Bank of Mobile vs. Boykin*, 9 *Ala.*, 320; Nor is the mere expression of an intention to pay the debt sufficient. *United States vs. Winkley*, 7 *Gray*, 460; *Stewart vs. Reckless*, 4 *Zabr*, 427: *Porter vs. Porter*, 31 *Maine*, (1 *Red.*,) 169. Nor does any equivocal act or declaration revive the debt. *Stark vs. Stinson*, 3 *Foster.* (*N. H.*,) 259.

When we examine the letter of Ferguson we find it falls very far short of these rules; it is not certain and unequivocal; contains nothing like a promise. The strongest expression in it is, "It will be all right," and an expressed desire to pay all his honest debts upon condition that hired labor will enable him to make the money. No absolute, unequivocal, unconditional promise to be found there. Nothing from which a jury would be allowed to torture a new promise. It is a pure question of law whether Ferguson intended by what he said to waive his discharge and be absolutely bound. Could plaintiffs have sued upon the letter, and by any sort of averment have shown a legal liability based upon it? If not it falls far short of such a promise as will waive the discharge, for to do that it must

be a new promise, a valid legal contract, absolute or conditional, to pay the debt, based upon the old debt as a consideration.

In many cases it has been holden, where the language is doubtful, and the intention and meaning of the party speaking is obscure, that it was a question for the jury to determine whether a new promise was intended. But this occurs in cases of parol promises, where the testimony is conflicting and the intention and meaning of the person promising, from the language, is capable of being ascertained by extrinsic evidence, and circumstances which surrounded the party and accompanied, preceded and followed the declaration. Here is a written document in which the writer has put his thought in a permanent form, and before it could ever go to a jury at all the court, as a question of law, must determine its meaning and signification, its weight and bearing as evidence, like any other written evidence. If upon its face, upon a fair construction of the language, no promise can be found by the court, it is its duty to exclude the writing from the jury. The question thus becomes and is a pure question of law. We candidly admit here that if the court can construe the letter of Ferguson as containing such evidence of a promise as a jury might pass on, and from which it might be warranted in finding a new promise, then it is not a question to be settled on demurrer, and if the replication had made the proper averments of the time when the new promise was made so as to have been an answer to the plea, the question of fact should have been left to a jury. On the other hand, if, as we contend, the costruction of the letter is a question of law, and being so devoid of a new promise on its face, the court is bound to withhold it from a jury, then there is no error on this point.

## RECAPITULATION.

We contend that there is no error in the record of the proceedings and judgment of the court below in sustaining the demurrer of defendant to plaintiffs' replication to the plea of discharge in bankruptcy:

1. Because the replication on its face is substantially defective in failing to aver that the new promise was made after defendant was decreed bankrupt, and not merely pending his petition.

2. Because if the replication is sufficient in its averments, the writing exhibited and relied on, and made a part of the replication, does not in law contain a new promise, and nothing from which a jury would be warranted in infering one.

Respectfully submitted,

CLARK & WILLIAMS, for Defendant.

Affirmed / 18-5 Judge Davis

Mowfoulk v Swarts Affirmed

Nov 22, 1873 — affirmed

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. [redacted] 51

THE UNION PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

WILLIAM S. PENISTON, TREASURER OF LINCOLN COUNTY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Affirmed

FILED DECEMBER 7, 1871.

Justice Strong Wrote

# SUPREME COURT OF THE UNITED STATES.

## No. 496.

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**THE UNION PACIFIC RAILROAD COMPANY, APPELLANT,**

**vs.**

**WILLIAM S. PENISTON, TREASURER OF LINCOLN COUNTY.**

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**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.**

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1 Pleas before the Hon. John F. Dillon, judge of the circuit court of the United States for the eighth judicial circuit and district of Nebraska, and the Hon. Elmer S. Dundy, judge of the district court of the United States for said district, sitting in said circuit court, at the term of May, 1871.

THE UNION PACIFIC RAILROAD COMPANY
*vs.*
WILLIAM S. PENISTON, TREASURER OF LINCOLN COUNTY, NEBRASKA.

Be it remembered that on the 2nd day of June, 1870, there was filed in the circuit court of the United States for said district of Nebraska, by and on behalf of the plaintiff above named, a paper, in words and figures following, to wit:

UNITED STATES OF AMERICA:

2 In the circuit court of the United States for the district of Nebraska:

To the hon. the judges of the circuit court of the United States for the district of Nebraska:

The Union Pacific Railroad Company, a corporation, and a citizen of the State of Massachusetts, having the principal place of business therein, by authority of the laws of the United States, brings this its bill against William S. Peniston, of the county of Lincoln, in the State of Nebraska, and a citizen of said State of Nebraska; and thereupon your orator complains and says:

That by an act of the Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1st, A. D. 1862, your orator was created a body politic and corporate by the name and style of the Union Pacific Railroad Company.

That in and by said act, and by acts of the Congress of the United States amendatory of, and supplementary thereto, the said Union Pacific Railroad Company was authorized to construct a railroad and telegraph line from a point on the western boundary of the State of Iowa, to be fixed by the President of the United States, westward to

3 where it might unite with or meet the Central Pacific Railroad to be constructed from the State of California eastward.

That soon afterwards, and about the first day of December, A. D. 1863, the President of the United States fixed the said point upon the western boundary of the State of Iowa, opposite to the city of Omaha, in the State of Nebraska, on the west bank of the Missouri River.

And thereupon the said company proceeded to and did build and construct a continuous line of railroad and telegraph from Omaha westward through the State of Nebraska and beyond the western boundary thereof, until it connected and united with said Central Pacific Railroad, and completed the same to said point of junction, on or about the 10th day of May, A. D. 1869, and has ever since operated the same.

That one of the chief and principal purposes of the incorporation of said railroad company and the construction of said railroad and telegraph line, was to secure the safe and speedy transportation of the

mails, troops, munitions of war, and public stores of the United States, over said railroad between remote and then inaccessible portions of the country, to transmit dispatches relative to the business of the Government of the United States, and otherwise to facilitate and promote the operations and ends of the said Government.

That in and by said act and amendatory acts, the Secretary of
4 the Treasury of the United States was authorized to, and subsequently did, issue to said railroad company bonds of the United States to a very large amount, to wit, over twenty-five millions of dollars, the repayment of which to the United States was in and by said acts secured by providing that the same should be and remain a mortgage and lien upon the whole of said railroad and telegraph line, together with the rolling-stock, fixtures, and property of every kind and description of said company, and by virtue thereof the United States now has a valid and subsisting lien upon all said property to the amount aforesaid and over. And the said railroad and telegraph line by reason of the premises became and are the means and instruments of the Government of the United States for carrying on its lawful and necessary operations.

And your orator further shows that it has, in all respects, complied with the provisions of said acts, and done and performed all the duties and requirements thereof on its part towards the United States and the people thereof, and is still able, ready, and willing so to do.

And your orator further shows that said railroad, together with the telegraph line connected therewith, crosses and runs through a portion of the county of Lincoln, in the State of Nebraska, and also of the county of Cheyenne, westward of Lincoln County, and across
5 unorganized territory between the northern portion of Lincoln County and said Cheyenne County.

That the number of miles of said railroad within the limits of Lincoln County, through the year 1869, was and still is about seven or eight miles, not exceeding eight miles; and the number of miles thereof in Cheyenne County then was and now is about one hundred and four or five miles, and not exceeding one hundred and five miles; and the number of miles thereof in the unorganized territory between said counties, then was and now is about sixty-three miles; and the whole length of said railroad, from the eastern boundary of Lincoln County to the west boundary of the State of Nebraska then was and now is one hundred and eighty-four miles; and of that distance about eight miles then was and still is within the Territory of Colorado, near the northern boundary thereof.

Your orator further shows that the assessor or assessors of the said county of Lincoln, in the year 1869, assuming and pretending that the said property of your orator, including the said railroad, was liable and subject to be assessed for taxation for State, county, and local and special purposes, assessed the said railroad track and bed, and placed the same upon the tax-list of said Lincoln County, as being two hundred and forty-six miles of railroad-bed within said county of Lincoln
6 and the territory attached thereto for revenue purposes, and valued the same for taxation at the sum of sixteen thousand dollars per mile; and assessed the same at the total valuation within said county and territory of three millions nine hundred and thirty-six thousand dollars.

And the said tax-list and assessment-roll having come into the possession or under the control of the county commissioners of said county of Lincoln, the said commissioners thereafter, some time in the year

1869, but at what particular time your orator is not informed, assumed and pretended to levy a tax or taxes upon the taxable property within said county and attached territory, the precise nature, purposes, amount, or rate of which your orator is not informed.

And soon afterwards, but at what precise time your orator is not informed, the county clerk of said Lincoln County made out a tax-list, or pretended tax-list, in which the name of your orator, the Union Pacific Railroad Company, was inserted as being the owner of two hundred and forty-six miles of railroad bed and track within said county and attached territory, and in which the valuation thereof was inserted and carried out at the sum of sixteen thousand dollars per mile, being in all three millions nine hundred and thirty-six thousand dollars; and the amount of taxes therein charged upon the same was forty-five
7 thousand two hundred and sixty-four dollars, the items of which were as follows:

| | |
|---|---|
| For State general fund | $7,872 |
| For State sinking-fund | $3,936 |
| For State school-fund | $3,936 |
| For county general fund | $19,680 |
| For county sinking-fund | $3,936 |
| And for district school purposes | $1,968 |

And afterwards, but at what time your orator is not informed, the said county clerk delivered said tax-list to William S. Peniston, then and still the treasurer of said county of Lincoln; and afterwards, as your orator is informed and believes, but at what time your orator is not informed, the commissioners of said county of Lincoln attached to said list their pretended warrant, requiring the said treasurer to collect the taxes therein named or levied.

And your orator further shows that the said William S. Peniston, treasurer aforesaid, under pretense of said warrant and tax-list, requested your orator to pay the said pretended taxes so levied upon the said railroad, which your orator, being advised that said taxes were and are wholly illegal, unauthorized, and void, has declined to pay; and the said treasurer has of late threatened, and still threatens, to seize, levy upon, and take large quantities and amounts of the personal property of your orator, and sell the same under pretense of col-
8 lecting the said taxes, and especially to so seize, levy upon, take, and sell divers cars and trains which are being constantly run upon and over its said railroad by your orator for carrying passengers and freight and the United States mails, by the doing of which acts great, manifest, and irreparable damage and injury would result to your orator; and your orator fears, and verily believes, that said treasurer is about to, and will, levy upon, take, and sell such property of your orator upon said pretense, if he is not speedily enjoined and restrained from so doing by this court.

Your orator further shows that it is advised that by reason of the premises none of the said property so as aforesaid assessed and upon which the said taxes were so levied was or is subject or liable to be taxed by authority of the State of Nebraska or said county of Lincoln, or any town, precinct, or civil division thereof, for any purpose; and it charges that the said pretended taxes are wholly unauthorized and void.

And your orator further charges that the county of Hall, and not the county of Lincoln, is the nearest organized county directly east of said unorganized county of Cheyenne; and that the portion of your orator's said railroad within Cheyenne County, or within said unorganized ter-

ritory, is not subject or liable to be assessed or taxed within or by the authority of the county of Lincoln.

9 That the total valuation, as shown by the valuation per mile specified in said tax-list of the portion of said railroad within Lincoln County is only one hundred and twenty-eight thousand dollars; and of the portion thereof within Cheyenne County is about one million six hundred and eighty thousand dollars; and of the portion thereof within the unorganized territory between the northern part of Lincoln County and the county of Cheyenne is about one million and eight thousand dollars; that the value of said railroad does not in fact exceed the valuation of the same per mile, at which it was so as aforesaid assessed.

Your orator further charges, upon information and belief, that the auditor of the State of Nebraska did not in any manner certify to the county clerk of said county of Lincoln the amount of the property or extent of the railroad of your orator, within the county of Lincoln in the year 1869, or in any organized precinct, township, city, or village thereof, or in any county attached or supposed to be attached thereto for revenue purposes, and that the town or village of North Platte, where the county clerk and the county commissioners of said Lincoln County did and performed their said pretended acts of assessment and levy of taxes, was not in fact, nor is within the limits of said county; and that in many other respects and particulars which your orator cannot at this time particularize, but which it begs leave hereafter to set forth if necessary, the said proceedings of the assessor or assessors, county

10 clerk, county commissioners, and treasurer of Lincoln County were irregular, unauthorized, and insufficient.

Your orator further shows, that the said William S. Peniston is not pecuniarily responsible for more than a very small proportion of the amount of said taxes sought to be collected by him; and further shows that is credibly informed and believes, that the total amount and valuation of the taxable property entered upon said tax-list is $4,081,904, (four million eighty-one thousand nine hundred and four dollars,) inclusive of the amount so as aforesaid assessed as your orator's property, leaving only the amount of one hundred and forty-five thousand nine hundred and four dollars ($145,904) of property assessed, as the property of persons and corporations other than your orator; and that the total amount of taxes levied upon all property in said county of Lincoln and territory thereto attached, is only fifty-one thousand six hundred and fourteen dollars and forty-five cents ($51,614.45) including the taxes levied upon your orator's property, leaving only six thousand three hundred and fifty dollars and forty-five cents ($6,350.45) levied upon all persons, corporations, and property other than your orator and its property.

And your orator further shows that the population of said county of Lincoln is very small, and, as your orator is credibly informed and believes, does not exceed one thousand, including the employees of

11 complainant connected with its railroad, who constitute a considerable portion thereof, and that the said county of Cheyenne and the unorganized territory between said counties is a wild and scarcely inhabited country, containing not exceeding five hundred inhabitants.

And your orator shows that it would be wholly impracticable to collect from said Lincoln County, or any officer or officers thereof, the amount of the taxes so as aforesaid assessed upon your orator's railroad and property, or any considerable part thereof, if such taxes should be

paid to said treasurer or collected by him, or go into the treasury of said county in any way, and it should be afterwards adjudged or determined that said taxes were wrongfully paid or collected, and that any attempt by or in behalf of your orator to collect the same would be futile and any remedy at law therefor would be inadequate and illusory.

And your orator shows to the court that if the said pretended taxes shall be collected from your orator the whole or greater portion thereof will be immediately disbursed and expended, or in some manner disposed of by the officers of said Lincoln County, and that your orator will have no practicable means of recovering the amount thereof, and will be wholly irremediable in a court of law.

12 To the end, therefore, that the defendant may, if he can, show why your orator should not have the relief hereby prayed, and that it may be adjudged and decreed by the court that all and singular the above-mentioned proceedings touching the assessing of your orator's said railroad and property, and the levying of taxes thereon, and the threatened collection thereof were and are irregular, unauthorized, and void, and that the said William S. Peniston, treasurer of said Lincoln County, and his successors, be perpetually enjoined from collecting the same or any part thereof, or attempting so to do; and that in the meantime the said William S. Peniston and his successor or successors in office be restrained and enjoined from seizing, taking, levying, or selling, or in any manner whatsoever med'ling or further med ling with any property or effects whatsoever of your orator or possessed or claimed by it by virtue of, under, or in compliance with any warrant, order, process, command, or direction, or upon any pretense whatever, for the collection or enforcement of any taxes, or costs, charges, or penalties assessed, levied, accrued, charged, or claimed so to be against or upon your orator or its property or effects in, by, or for the said county of Lincoln, or the State of Nebraska, or any precinct, town, district, or civil division thereof; and that upon the hearing of this cause your orator may such further or other relief in the premises as the nature of its case shall require and to your honors shall seem meet:

13 May it please your honors to grant unto your orator not only the most gracious writ of injunction as aforesaid, but also the most gracious writ of subpœna of the United States of America, to be directed to the said William S. Peniston, commanding him, at a certain day and under a certain penalty therein to be specified, to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your orator shall ever pray.

A. J. POPPLETON,
*Sol. for Compl't.*

E. WAKELY, *of Counsel.*

STATE OF NEBRASKA, *Douglass County, ss:*

On this second day of June, A. D. 1870, personally came before me Andrew J. Poppleton, who, being duly sworn, says that he is the solicitor of the above-named Union Pacific Railroad Company, and knows the contents of the above bill of complaint, and is familiar with the facts therein set forth; and that the matter and things therein stated are true of his knowledge, except such as are therein stated to be set forth or averred upon information and belief, and as to these matters he believes the same to be true.

Taken and sworn before me the day and year last mentioned.

WATSON B. SMITH, *Clerk.*

14 Upon said paper appears endorsements in words and figures following, to wit:

No. 36 B. In the U. S. circuit court, dist. of Nebraska. Union Pacific Railroad Company vs. William S. Peniston, treasurer, &c. Bill of complaint. A. J. Poppleton, sol'r for complainant. Filed June 2nd, 1870. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on the 2nd day of June, A. D. 1870, a subpœna was issued out of said court in said cause, which is in words and figures following, to wit:

UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

The President of the United States of America to William S. Peniston, treasurer of Lincoln County, Nebraska, greeting:

We command you that you appear before the judges of the circuit court of the United States for the district of Nebraska, at Omaha, on the first Monday in July next, it being the 4th day of July, A. D. 1870, to answer to the bill of complaint of the Union Pacific Railroad Company, this day filed in the office of the clerk of said court, and then and there to receive and abide by such judgement and decree as shall
15 then or thereafter be made, upon pain of judgement being pronounced against you by default.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Omaha, this 2nd day of June, A. D. 1870, and of the independence the 94th year.

[SEAL.] WATSON B. SMITH, *Clerk.*

MEMORANDUM.—The above-named defendant is notified that unless he enter his appearance in the clerk's office of said court at Omaha aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against him as confessed, and a decree entered thereon accordingly.

WATSON B. SMITH, *Clerk.*

Upon said subpœna appears endorsements in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that, on the thirteenth day of June, A. D. 1870, I served the within writ on William S. Peniston, defendant within named, at North Platte, in said district, by delivering to him a true copy of this writ.

J. T. HOILE, *U. S. Marshal.*

16 No. 36. B. Circuit court of the United States for the district of Nebraska. In chancery. The Union Pacific Railroad Company vs. William S. Peniston, treasurer, &c. Subpœna in chancery. Returnable to rule-day, first Monday in July, A. D. 1870. Watson B. Smith, clerk. Returned and filed June 14th, A. D. 1870. Watson B. Smith, clerk. A. J. Poppleton, comp'ts' sol. Marshal's costs, $63.60.

Thereupon afterward, to wit, on the 3rd day of June, A. D. 1870, the following proceeding was had, as appears of record in said cause, which is in words and figures following, to wit:

UNION PACIFIC RAILROAD COMPANY
*vs.*
W. S. PENISTON, TREASURER.

Now, this 3rd June, 1870, this cause came on for hearing before the undersigned, at chambers, on application of complainants for the allowance of a temporary injunction, (notice of the time and place for hearing such application having been first given;) and no objection to the allowance of the same having been interposed, a temporary injunction is hereby allowed, to continue in force until modified or disal-
17 lowed, as prayed for in the bill. And on the complainant filing with the clerk of the said court a proper bond in the sum of $5,000.00, to be approved by clerk, injunction to issue, as directed herein.

ELMER S. DUNDY, *Judge.*

A. J. POPPLETON, *for Comp.*
No one appears for Resp.

Thereupon, afterwards, to wit, on the 10th day of June, A. D. 1870, a bond was filed in the clerk's office of said court in said cause, which is in words and figures following, to wit:

Know all men by these presents that we, the Union Pacific Railroad Company, as principal, and C. G. Hammond and A. J. Poppleton, both of Omaha, as sureties, are held and firmly bound unto William S. Peniston, treasurer of the county of Lincoln, in the penal sum of five thousand dollars, to the payment thereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents, dated at Omaha this ninth day of June, 1870.

Whereas the above-bounden Union Pacific Railroad Company has filed its bill of complaint vs. said William S. Peniston, treasurer of said county of Lincoln, in the circuit court of the United States for the eighth judicial circuit and district of Nebraska, praying that said
18 William S. Peniston, treasurer, be restrained and enjoined from collecting the State, county, school, and other taxes, assessed and levied upon the property of the said company by said county for the year eighteen hundred and sixty-nine, and on which the Hon. E. S. Dundy has allowed an injunction for that purpose, upon giving the security in said order of allowance named:

Now, therefore, the condition of the above obligation is such that if the above-bounden Union Pacific Railroad Company, C. G. Hammond and A. J. Poppleton, their successors or personal representatives, shall pay to the said William S. Peniston, treasurer of said Lincoln County, all damages which the said William S. Peniston, treasurer of Lincoln County, may sustain by reason of the issue of such injunction, then this obligation shall be void; otherwise of force.

THE UNION PACIFIC RAILROAD COMPANY,
By A. J. POPPLETON, *its Attorney.*
C. G. HAMMOND, *Surety.*
A. J. POPPLETON, *Surety.*

Approved:

WATSON B. SMITH, *Clerk.*

Upon said bond appears endorsements, in words and figures following, to wit:

No. 36 B. United States circuit court, district of Nebraska. Union

Pacific R. R. Co. vs. W'm S. Peniston, treas'r, &c. Bond. Filed June 10th, 1870. Watson B. Smith, clerk.

19 Thereupon, afterward, to wit, on the 10th day of June, A. D. 1870, a writ of injunction was issued out of said court in said cause, which is in words and figures following, to wit:

UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

The President of the United States of America to William S. Peniston, treasurer of the county of Lincoln, in the State of Nebraska:

We do hereby command and enjoin that you and your successors in office do and shall cease, and hereafter altogether abstain and refrain from seizing, taking, levying upon, or selling, or in any manner whatsoever meddling with any property or effects whatsoever of the Union Pacific Railroad Company, or possessed or claimed by it, by virtue of, under, or in compliance with any warrant, order, process, command, or direction, or upon any pretense whatever for the collection or enforcement of any taxes or costs, charges or penalties assessed, levied, accrued, charged, or claimed so to be against or upon the said Union Pacific Railroad Company, or its property or effects in, by, or for the said county of Lincoln, or the State of Nebraska, or any precinct,
20 town, district, or civil division thereof, under such penalty as may be ordered; and this injunction to continue in force until modified or dissolved.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Omaha, this 10th day of June, A. D. 1870.

[SEAL.] WATSON B. SMITH, *Clerk.*

Upon said writ of injunction appears endorsements in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the thirteenth day of June, A. D. 1870, I served the within writ on William S. Peniston, defendant within named, at North Platte, in said district, by delivering to him a true copy of this writ.

J. T. HOILE, *U. S. Marshal.*

No. 36. B. The Union Pacific Railroad Co. vs. Wm. S. Peniston, treasurer, &c. Writ of injunction filed June 14th, 1870. Watson B. Smith, clerk. Marshal's costs, $2.00.

Thereupon afterwards, to wit, on the 14th June, 1870, a paper was filed in said cause, which is in words and figures following to wit:

UNITED STATES OF AMERICA:

In the circuit court of the United States for the district of Nebraska.

21 THE UNION PACIFIC RAILROAD COMPANY
*vs.*
WILLIAM S. PENISTON, TREASURER OF LINCOLN County.

To the said William S. Peniston:

You are hereby notified that the above-named Union Pacific Railroad Company will apply to the Hon. Elmer S. Dundy, one of the judges of

the above-mentioned court, and judge of the said district, at chambers, at his residence in Falls City, in the county of Nemaha, in the State of Nebraska, on the 3rd day of June, A. D. 1870, at one o'clock p. m., for a writ of injunction to be issued in the above-entitled cause, as prayed for, enjoining and restraining you, as treasurer of the county of Lincoln or otherwise, from seizing, taking, levying on, selling, or in any manner whatever med'ling, or further med'ling with any personal or other property, or any effects whatsoever of the said Union Pacific Railroad Company, or possessed or claimed by it, by virtue of, under, or in compliance with any warrant, order, process, command, or direction, or upon any pretense whatever, for the collection or enforcement of any tax or taxes, costs, charges, or penalties assessed, levied, accrued,
22 charged, or claimed so to be, against or upon the said Union Pacific Railroad Company or its property or effects, in, by, or for the said county of Lincoln or the State of Nebraska, or any precinct, town, district, or division; and also for such other injunction as may be warranted by the bill of complaint.

Dated May 27th, 1870.

A. J. POPPLETON,
*Sol'r for Union Pacific Railroad Co.*

STATE OF NEBRASKA,
*County of Lincoln, ss:*

J. R. Contlin, being duly sworn, says that on the 28th day of May, A. D. 1870, about the hour of 8 o'clock a. m., he served the above notice upon the said William S. Peniston, treasurer of Lincoln County, by delivering to him in person, at North Platte, in said county, a copy and duplicate of said notice.

J. R. CONTLIN.

Subscribed in my presence, and sworn to before me this 28th day of May, A. D. 1870.

[SEAL.] R. C. DOUGHERTY.
*Clerk of the Dist. Court.*

Upon said paper appears endorsements in words and figures following, to wit:

No. 36 B. U. S. circuit court. District of Nebraska. Union Pacific Railroad Co. vs. W'm S. Peniston, treasurer Lincoln Co., Neb. Notice of application for injunction. Filed June 14th, 1870. Watson B. Smith, clerk.

23 Thereupon afterward, to wit, on the 29th day of August, a paper was filed in said court in said cause, which is in words and figures following, to wit:

In the United States circuit court. District of Nebraska. In equity.

*The answer of William S. Peniston, treasurer of Lincoln County, defendant, to the bill of complaint of the Union Pacific Railroad Company, plaintiff.*

This defendant now and at all times hereafter saving and reserving to himself all and all manner of benefit and advantage of exception which may be had or taken to the many errors and insufficiencies in the said plaintiff's said bill of complaint contained, for answer thereunto, or

unto so much or such parts thereof as this defendant is advised is material for him to make answer unto, answering, says that he believes it to be true that the said plaintiff is a corporation incorporated by and organized under the several acts of Congress in that behalf, in its said bill entitled, and has constructed and is operating its railroad from the point on the western boundary of the State of Iowa to the point of junction with the Central Pacific Railroad, and that the same runs through the section of country in that behalf in the said bill mentioned, and
24 says that the same runs through the counties of Douglass, Dodge, Hall, Platte, Lincoln, and other country in this State, but this defendant denies that the said plaintiff is a citizen of the State of Massachusetts.

And this defendant, further answering, denies that the principal purposes of the incorporation of the said plaintiff and of the construction of its railroad and telegraph line was, as in said bill in that behalf is alleged, but this defendant says that the enterprise of said plaintiff was conceived and carried forward to the present successful and profitable operation of its railroad by private citizens for their private gain; that the services to the Government, rendered by said plaintiff, is no other nor greater than those rendered by the other great lines of railroad in this country; that, for the safe and speedy transportation of the mails, troops, munitions of war, and public stores of the United States over said railroad, and for the transmission of the dispatches relative to the business of the Government of the United States, and for whatsoever other services it does or may render to facilitate & promote the operations and ends of said Government, it is paid by the United States in full, or allowed the value of its said service upon or on account of its indebtedness to said Government, and these payments or allow-
25 ances are made in precisely the same way, and all the other dealings and transactions of the said plaintiff with the Government are conducted in precisely the same manner on the one side and on the other as are those of any other of the great railroad ccmpanies of the country.

And this defendant, further answering, says he believes it to be true that bonds of the Government to a very large amount, but to what amount he is not informed, were issued to said company to aid it in its enterprise of building said road, and that the repayment thereof is secured to the United States, as it in its said bill has alleged, but their value is not and cannot be affected by the taxes now complained of, and that it has complied with all the requirements prescribed, and discharged all the duties imposed by said act of Congress.

And this defendant, further answering, admits that the said railroad of the said plaintiff runs through Lincoln and Cheyenne Counties and the unorganized territory lying between said counties, but whether the number of miles in said counties and territory, respectively, or either of them, is, as is stated in said bill, this defendant does not know and has not been informed save by the returns to the auditor of state, made by said plaintiff, hereinafter mentioned; and upon the said information this defendant denies the allegations in that behalf in the said bill made.

26 And this defendant, further answering, admits that the assessor of said Lincoln County, assuming (as the fact was) that the said plaintiff's property was liable and subject to be assessed for taxation, as in said bill is alleged, assessed the railroad bed of said plaintiff, and placed the same upon the tax-list of said county as being two hundred and forty-six miles in said county and the counties attached thereto, for

revenue purposes, and valued the same at sixteen thousand dollars per mile, and assessed the same at the total valuation within said county and said attached territory, of three million nine hundred and thirty-six thousand dollars.

And this defendant, further answering, says that the assessment-roll having duly come to the county commissioners of said county, they, on the fourth day of July, 1869, levied taxes upon the property in said county and said attached territory for the purposes prescribed by law.

And this defendant, further answering, admits that the clerk of said county made out the tax-list, showing therein the name of said plaintiff as the owner of the railroad bed and track within said county and the said attached territory, and in which were inserted the items and were carried out the sums in the said bill in that behalf alleged.

27 And this defendant, further answering, admits that said clerk delivered said tax-list to this defendant, who then was, and now is, the treasurer of said county, and says that, when the same was so delivered to him to be executed, attached thereto was the warrant of said commissioners, directing this defendant, as treasurer as aforesaid, to collect the taxes therein named as levied.

And this defendant, further answering, admits that he has applied to said plaintiff to pay said taxes, and it has refused so to do, and that, upon the dissolution of the injunction herein issued, it is his purpose, in pursuance of the command of said warrant, as it is his duty, to enforce said taxes against said plaintiff in the manner prescribed by law, although he denies that he has ever threatened, or purposed or now purposes to seize, levy upon, take or sell any cars or trains used by said plaintiffs in carrying passengers or freight or the public mails over said railroad, nor otherwise oppressively enforce the said taxes against the said plaintiff.

And this defendant, further answering, alleges that the relative positions of Hall, Lincoln, and Cheyenne Counties and of the railroad of said plaintiff are truly set forth and appear upon a map thereof hereto annexed, marked Exhibit "A;" that the valuation per mile, specified in said tax-list of the portion of said railroad in Lincoln

28 County is $16,000, and not otherwise; and of the portion thereof in Cheyenne County is $16,000, and not otherwise, and the portion thereof in the unorganized territory between the north part of Lincoln County and the county of Cheyenne is $16,000, and not otherwise.

And this defendant, further answering, denies that said auditor of the State of Nebraska did not certify to the county clerk of Lincoln County the extent of said plaintiff's railroad in said counties of Lincoln and Cheyenne and said attached territory, but alleges that he did do so in manner provided by law, and denies that North Platte is not in Lincoln County, or that the proceedings to assess, equalize, levy or enforce said taxes against said plaintiff were in any respect irregular, unauthorized, or insufficient.

And the said defendant, further answering, admits that he is not pecuniarily responsible for the whole amount of the taxes sought to be collected by him from said plaintiff, and says that the total amount & valuation of taxable property entered upon said tax-list is $4,087,904.00; that the amount of property assessed as the property of persons

29 and corporations other than said plaintiff in said county and territory attached, is $151,904.00—(amount levied in said county and territory attached thereto is $48,969.77)—that the total *and that the* amount levied upon all persons, corporations, and property other than said plaintiff and its property is $3,705.77, and that the population in

said county of Lincoln and the territory attached is somewhat, but not considerably, more than is stated in said bill.

And this defendant, further answering, says that, if the said taxes levied upon the property of said plaintiff were paid, the sums so realized would at an early day be disbursed from the treasury by paying debts contracted and defraying expenses incurred in supporting civil government in the two counties aforesaid and the unorganized territory between them; and if said plaintiff shall, by the decree of this court, be declared exempt from the payment of taxes, it would not be practicable for said county to repay to it the sum so collected from it; but this defendant submits that the common law, by its remediable process, is adequate to protect the said plaintiff in the premises if the said taxes are illegally assessed against it.

And this defendant, further answering, says that, by an act of the legislative assembly of the late Territory of Nebraska entitled "An act to organize the county of Kearney, to define its boundaries, and to locate the county-seat thereof," approved January 10, 1860, it was,
30 among other things, provided that "all that portion of the Territory of Nebraska within the following limits, viz: Beginning at a point in the center of the main channel of the Platte River, fifteen miles east of the flag-staff at Fort Kearney; running thence due south to the dividing line between the Territories of Kanzas and Nebraska; thence in a direction due west one degree; thence due north to the center of the main channel of the Platte River; thence following the meandering of said stream to the place of beginning, is hereby declared to be known and called by the name of Kearney County; and that the said legislative assembly passed an act entitled "An act to define the boundaries of Shorter County, approved January 7, 1860, whereby it was provided as follows: "All that portion of territory contained within the following named lines and boundaries is hereby ceded into a separate county, to be known as Shorter County, beginning at the southwest corner of Kearney County; thence due west along the dividing line of Kansas and Nebraska one degree; thence due north to the south bank of the north branch of the Platte River; thence east along the said north branch to the point of its junction with the south branch of said Platte River;
thence east along the center of the main channel of said Platte
31 River to the northwest corner of Kearney County; thence south along west line of said Kearney County to the place of beginning;" that the said legislative assembly passed an act entitled "An act to change the name of Shorter County," approved December 11, 1861, whereby it was provided that "the name of Shorter County shall be, and hereby is, changed to Lincoln County. (Sec. 2.) All acts and parts of acts inconsistent with this act are hereby repealed. (Sec. 3.) This act to take effect and be in force from and after its passage;" that the general assembly of the State of Nebraska passed an act entitled "An act to define the western boundary of Lincoln County," approved February 17, 1869, whereby it was provided as follows: "That the western boundary of the county of Lincoln be, and the same is, hereby extended five miles west of the western boundary of said county as defined by the provisions of an act entitled 'An act to define the boundaries of Shorter County,' (since changed to Lincoln County,) approved Jan'y 7th, 1860, and that all the unorganized territory lying west of the western boundary of said county of Lincoln, as hereinafter provided, and east of the east line of Cheyenne County, and south of the North Platte River, be, and the same is hereby, attached to the said county of Lincoln for judicial and revenue purposes; and that the county of Cheyenne be, and the

same is hereby, attached for judicial and revenue purposes to the said county of Lincoln. (Sec. 2.) This act shall take effect and be in force from and after its passage."

32 And the defendant, further answering, says that, on the third day of April, 1869, Webster Synder, esquire, was the general superintendent of said plaintiff, and on said day he, as said superintendant, and for and on behalf of said plaintiff, made to the honorable the auditor of state of the State of Nebraska a return of certain of the property of said plaintiff, together with a statement of the amount of such property which was situated in the said Lincoln County, Cheyenne County, and the aforesaid attached territory, a copy of which return and statement is hereto annexed, marked Exnibit "B;" that the said auditor, having certified the said matter to the clerk of said county, as hereinbefore stated, and as by law it was his duty to do, the county commissioners of the said county of Lincoln, at a court duly held, commencing the third Monday in April, 1869, and continued from day to day for three days thereafter, sat as a board of equalization, and then and there no one appeared for or on account of said plaintiff, yet the said board did duly and fairly equalize the valuation of the property of said plaintiff so as aforesaid, by said auditor returned, and by said assessor assessed, nor from said action of said board was any appeal ever taken. Wherefore the said defendant submits that the said plaintiff is by the said acts above set forth concluded from calling the same in question in this cause.

33 And this defendant, further answering, says that the town of North Platte, in the said bill mentioned, is, and for the period of fours years and more last past has been, the county seat of Lincoln County; that it is the only town in said county; that it is about half way between Omaha, Nebraska, and Cheyenne, in Wyoming Territory, which are the principal towns on said railroad; that it is located at the confluence of the north and south branches of the Platte River, upon the frontier of the settlements in this State; that, by reason of these circumstances of its situation, it happens that travel flows to it from either direction, and that in the adjacent country large numbers of desperate characters collect, who prey upon the public, and especially on the property of said plaintiff and its passengers; that, during the year 1869, persons were arrested, and at North Platte aforesaid examined and tried for the commission of offenses upon the line of said railroad, running from the east line of Lincoln County to the west line of Cheyenne County; that most of the offenses complained of were commit'ed against the property either of said plaintiff or its passengers; that the amount of crime which engages the attention of the courts committed in said two counties and the territory between them attached to Lincoln County is equal to all that is committed in the remainder of the third judicial district of the State; and while, by a rigid enforcement of the laws, the

34 amount thereof has been greatly reduced, yet any relaxation of justice would remit that whole region to a state of lawlessness, so that property and life would be unsafe; that this state of things has been caused by building said railroad, and said plaintiff, as it has occasioned the necessity of, now enjoys protection from a civil government, to the just expense of which it is unwilling to contribute.

And this defendant submits to this honorable court that all and every one of the matters in the said plaintiff's bill mentioned and complained of, are matters with respect to which it is not entitled to any relief from a court of equity, and this defendant hopes that he shall have the same benefit of this answer as if he had demurred to the said plaintiff's bill.

And this defendant denies all unlawful combination and confederacy in the said bill charged, without that any other matter or thing material or necessary for him to mak' answer unto and not herein or hereby well or sufficiently answered unto, confessed or avoided, traversed or denied, is true to the knowledge or belief of this defendant.

All which matters and things this defendant is ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in behalf most wron'fully sustained.

W. S. PENISTON,
*Treasurer Lincoln Co., Nebraska.*

J. M. WOOLWORTH,
*Solicitor & of Counsel for the Defendant.*

35 DISTRICT OF NEBRASKA, *ss:*

William S. Peniston, being duly sworn, says he is the defendant whose name is subscribed to the foregoing answer; that he has read the said answer, and knows the contents thereof, and the same is true of his own knowledge, except as to the matter and things therein stated on information and belief, and as to those matters he believes it to be true.

W. S. PENISTON.

Subscribed in my presence & sworn to before me this 10th day of August, 1870.

[SEAL.] R. C. DOUGHERTY,
*Clerk of the District Court Lincoln County, Neb.*

EXHIBIT "B."—*Assessment blank.*

To WEBSTER SNYDER,
*Superintendent U. P. R. R. Co., Omaha, Nebraska:*

You are hereby notified that according to the provisions of certain acts of the legislature of the State of Nebraska, providing for the collection of the revenue and for the levying and collection of taxes in the State of Nebraska, approved January 11, 1861, and approved February 15th, 1864, and approved June 20, 1867,* you are hereby required to make out and return to the auditor of the State of Nebraska, on or before the 1st day of March, annual'y, a statement or list of
36 property which by law is subject to taxation, for which purpose a blank form, in accordance with the requirements in that case made and provided, is hereto annexed and which you are hereby required to fill with the amount or number of the description of property set opposite thereto, and subscribe to and take the oath herein prescribed, to be administered by me or any other officer duly authorized to administer oaths in the premises.

Given under my hand this 28th day of January, 1869.

(Signed) JOHN GILLESPIE,
*Auditor of the State of Nebraska.*

* All unorganized counties shall be attached to nearest organized county directly east of them for election, judicial and revenue purposes. (Revised Statutes, page 45, sec. 1, chap. 10.)

| Personal property. | Douglas County. | Sarpy County. | Dodge County. | Platte County. | Merrick County. | Hall County. | Buffalo County. | Lincoln Co. and west to State line. | Total number. | Average value. | Total assessed value. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| No. of miles, road-bed in.. | | | | | | | | | | | |
| " depots " .. | | | | | | | | | | | |
| " wood-stations " .. | | | | | | | | | | | |
| " water-stations " .. | | | | | | | | | | | |
| " telegraph poles " .. | | | | | | | | | | | |
| " miles telegraph wire in.. | 29.5 | 14. | 25 | 37.3 | 44.9 | 25.7 | 38.4 | 246 | 460.9 | 16,000 | $7,074,400 |
| " bridges " .. | | | | | | | | | | | |
| " boats " .. | | | | | | | | | | | |
| " books " .. | | | | | | | | | | | |
| " papers " .. | | | | | | | | | | | |
| " office furniture and fixtures* .. | | | | | | | | | | | |
| " money and credits (of actual value in money) ..... | | | | | | | | | | | |
| " movable property, engines &c ..... | | | | | | | | | | | |
| " other realty ..... | | | | | | | | | | | |

38 *NOTE.—The president, secretary, superintendent, or other principal accounting officer within the State at the time of the assessment, of every canal or slack-water navigation company, railroad company, turnpike company, plank-road company, bridge or ferry company, insurance company, telegraph company, or other joint stock company, except banking or other corporations whose taxation is specifically provided for in this chapter, for whatever purpose they may have been created, whether incorporated by any law of this State or not, where any portion of said property at the time of the assessment is situated in more than one county, shall list for taxation, verified by the oath or affirmation by the person so listing, all the personal property, which shall be held to include road-bed, depots, wood and water stations, poles and wire, bridge and boats, books, papers, office furniture and fixtures, and such other realty as is necessary for the daily business operations of said road, bridge, insurance, or other company or incorporation; moneys and credits of such corporation within the State at the actual value in money in manner following to wit: "In all cases except as hereinafter provided, a full return of all property shall be made to the auditor of state, on or before the 1st Monday in March annually, together with a statement of the amount of such property, which is situated in each organized county, precinct, or township, incorporated village, or city therein. The value of all movable property shall be added to the stationary and fixed property; provided, that when-
39 ever the whole of the property of any company aforesaid shall be in one county only, the return shall be made to the assessor or assessors in the same manner as returns of other property are made. (Revised Statutes, page 881, Estabrook's edition.)

I, Webster Snyder, do solemnly swear that I have listed within all the lands, town-lots, and all the personal property, money, and credits, and other realty subject to taxation and owned by the Union Pacific Railroad Company, as required by law to be listed, to the best of my knowledge.

(Signed) WEBSTER SNYDER,
*Gen'l Sup't.*

Sworn to and subscribed before me this 3rd day of April, 1869.

OFFICE STATE AUDITOR,
*Lincoln, August* 1, 1870.

I hereby certify that the foregoing is a correct copy of original assessment of U. P. R. R. Co., as returned by Webster Snyder, gen'l sup't, for 1869.

[SEAL.] (Signed) JOHN GILLESPIE,
*State Auditor.*

Upon said paper appear endorsements in words and figures following to wit:

U. S. circuit court. In equity. No. 36 B. U. P. R. R. Co. vs. W'm S. Peniston, treasurer. Filed Aug. 29, 1870. Answer. Watson B. Smith, clerk.

40 Thereupon, afterward, to wit, on the 4th day of October, A. D. 1870, a paper was filed in said cause, which is in words and figures following, to wit:

In the circuit court of the United States, district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY
*vs.*
WILLIAM S. PENISTON, TREASURER, &C.

*The replication of the Union Pacific Railroad Company, complainant, to the answer of William S. Peniston, defendant.*

This repliant saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, saith that it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law, to be replied unto, confessed, and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver and prove as this hon-
41 orable court shall direct, and humbly prays as in and by its said bill it has already prayed.

A. J. POPPLETON,
*Sol'r for Comp't.*

E. WAKELY, *of Counsel.*

Upon said paper appears endorsements in words and figures following, to wit:

No. 36 B. U. S. circuit court. The U. P. R. R. Co., comp't, vs. W'm S. Penniston, def't. Replication. Poppleton, Wakely for comp't. Filed Oct. 4th, 1870. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on the 11th Nov., 1870, a paper was filed in said cause, which is in words and figures following, to wit:

In the United States circuit court, district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY
*vs.*
WILLIAM S. PENISTON, TREASURER LINCOLN County.

And now comes the said complainant, by its solicitors, and moves the

court to continue the injunction heretofore granted by his hon., Judge Dundy, until the final hearing of this cause.

A. J. POPPLETON,
E. WAKELY,
*Sol. for Compl't.*

42 Said paper bears endorsements in words and figures following, to wit:

No. 36 B. United States circuit court. U. P. R. R. Co. vs. W. S. Peniston, treasurer Lincoln Co. Motion to continue injunction. Filed Nov. 11, 1870. Wstson B. Smith, clerk.

Thereupon, afterwards, at the November term of said court, to wit, on the 11th day of November, A. D. 1870, proceeding was had, as appears of record in said cause, in words and figures following, to wit:

THE UNION PACIFIC RAILROAD COMPANY
*vs.*
WILLIAM S. PENISTON, TREASURER LINCOLN County, Neb. } 36 B.

On this day came on to be heard the motion of the complainant, that the injunction heretofore allowed in this cause be continued in force until the hearing of said cause, and the same was argued by counsel, and thereupon the court not being fully advised in the premises, it is ordered, by consent of counsel, that within twenty days counsel for complainant shall serve upon counsel for respondent a copy of their argument upon said motion; and that within twenty days there-
43 after counsel for respondent shall serve upon opposite counsel a copy of his argument thereon, and that the decision thereon may be made and entered in vacation; and that in the meantime and until such decision be made and entered, the said injunction shall continue in force.

Thereupon, afterward, to wit, on the 11th day of November, A. D. 1870, a paper was filed in said cause, which is in words and figures following, to wit:

In the United States circuit court for the district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY
*vs.*
W. S. PENISTON, TREASURER LINCOLN County.

STATE AND DISTRICT OF NEBRASKA, *ss:*

Oscar F. Davis, being duly sworn, on oath deposes and says: That he is a surveyor and the land agent of the Union Pacific Railroad Company, and has been such agent since September, 1868; that as such he has personal knowledge of the amount of track of said railroad west of the east line of the county of Lincoln, in the State of Nebraska, and east of the west boandary of said State; that the whole length of said road afore described and within the limits aforesaid is one hundred and seventy-six miles.

OSCAR F. DAVIS.

44 Subscribed in my presence and sworn to before me November 11th, 1870.

WATSON B. SMITH, *Clerk.*

Upon said paper appears endorsements in words and figures following, to wit:

No. 36 B. U. S. circuit court. U. P. R. R. Co. vs. W. S. Peniston, treasurer. Affidavit of O. F. Davis. Filed Nov. 11, 1870. Watson B. Smith, clerk.

Thereupon, afterward, to wit, on the 11th day of November, A. D. 1870, a map was filed in said cause, as follows, to wit:

(Here follows map, marked page 45.)

46 Thereupon, afterward, to wit, on the 21st day of January, A. D. 1871, a paper was filed in said cause, which is in words and figures following, to wit:

In the United States circuit court for the district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY, comp't,
*vs.*
WILLIAM S. PENISTON, TREASURER, &C., defendant.

In this cause it is stipulated and agreed that the facts, in addition to those which appear from the pleadings, are as follows:

That, pursuant to the act of Congress touching that matter, the complainant had, previous to the commencement of this action, established and located and then had its principal place of business, that is to say, its general office, where its records are kept and where its board of directors meet to transact business, and the offices of its president, secretary, treasurer, and other offices, at Boston, in the State of Massachusetts.

That the number of miles of complainant's railroad actually in the respective counties and in the unorganized territory attached to
47 Lincoln County for general revenue purposes is as follows:

In Lincoln County, eight miles; in Cheyenne County, one hundred and five miles; between said counties, sixty-three miles; making, between the east line of Lincoln County and the west line of the State of Nebraska, a total of one hundred and seventy-six miles.

That the population of said county of Lincoln and attached territory, according to the United States census of 1870, was thirteen hundred and fifty-two.

That the defendant is possessed of only a small amount of property, and that an action at law to recover back from said Peniston taxes paid to him would be unavailing.

The proceedings for assessing the property and levying the taxes and to enforce the same, and to equalize the assessed valuation of property, were regular in point of form; that the auditor of state duly served Webster Snyder, who was the general superintendent of the plaintiff, with a notice, a copy of which is hereto annexed, marked "A;" and he, in response thereto, made the return, a copy of which is hereto annexed, marked "B;" but the valuation of $16,000.00 per mile was inserted by

the proper legal authorities after the return of said superintendent had come to the auditor.

48 The several acts of the legislature of Nebraska are correctly set forth in the defendant's answer.

A certified copy of the return of said superintendant was sent by the auditor to the county clerk of Lincoln County.

A. J. POPPLETON,
E. WAKELY,
*Sol'rs for Comp't.*
J. M. WOOLWORTH,
*Sol. for D'f't.*

*Exhibit "A."*

To WEBSTER SNYDER,
*Superintendent U. P. R. R. Co., Omaha, Nebraska:*

You are hereby notified that, according to the provisions of certain acts of the legislature of the State of Nebraska, providing for the collection of the revenue, and for the levying and collection of taxes, in the State of Nebraska, approved January 11th, 1861, and approved February 15th, 1864, and approved June 20th, 1867:

You are hereby required to make out and return to the auditor of the State of Nebraska, on or before the first day of March, annually, a statement or list of property, which, by law, is subject to taxation, for which purpose a blank form, in accordance with the requirements in that case made and provided, is hereto annexed, and which you are hereby required to fill with the amount or number of the descrip-

49 tion of property set opposite thereto, and subscribe to and take the oath herein prescribed to be administered by me or any other officer duly authorized to administer oaths in the premises.

Given under my hand this 28th day of Jan'y, 1869.

(Signed) JOHN GILLESPIE,
*Auditor of the State of Nebraska.*

50 EXHIBIT "B."

| Personal property. | Douglas County. | Sarpy County. | Dodge County. | Platte County. | Merrick County. | Hall County. | Buffalo County. | Lincoln County & west to State line. | Total number. | Average value. | Total assessed value. |
|---|---|---|---|---|---|---|---|---|---|---|---|
| No. of miles road-bed in.. | | | | | | | | | | | |
| " depots " .. | | | | | | | | | | | |
| " wood-stations " .. | | | | | | | | | | | |
| " water-stations " .. | | | | | | | | | | | |
| " telegraph-poles " .. | | | | | | | | | | | |
| " miles telegraph-wire in.. | 29.5 | 14.1 | 25 | 37.3 | 44.9 | 25.7 | 38.4 | 246 | 460.9 | 16 000 | $7,074,400 |
| " bridges " .. | | | | | | | | | | | |
| " boats " .. | | | | | | | | | | | |
| " books " .. | | | | | | | | | | | |
| " papers " .. | | | | | | | | | | | |
| " office-furniture & fixtures, (of actual value in money).. | | | | | | | | | | | |
| " money and credits.. | | | | | | | | | | | |
| " movable property, (engines, &c.)..... | | | | | | | | | | | |
| " other realty..... | | | | | | | | | | | |

51 I, Webster Snyder, do solemnly swear that I have listed within all the lands, town-lots, and all the personal property, money and credits, and other realty, subject to taxation, and owned by the Union Pacific Railroad Company as required by law to be listed, to the best of my knowledge.

(Signed) WEBSTER SNYDER,
*Gen'l Sup't.*

Sworn and subscribed before me this 3rd day of April, 1869.

OFFICE STATE AUDITOR,
*Lincoln, August 1st*, 1870.

I hereby certify that the foregoing is a correct copy of original assessment of U. P. R. R. Co., as returned by Webster Snyder, gen'l sup't, for 1869.

JOHN GILLESPIE,
*State Auditor.*

Upon said paper appears endorsements in words and figures following, to wit:

No. 36 B. U. S. circuit court, dist. of Nebraska. U. P. R. R. Co., comp't, vs. W'm S. Peniston, def't. Stipulation as to facts. Filed Jan'y 21, 1871. Watson B. Smith, clerk.

Thereupon, afterward, at the May term of said court, to wit, on the 2nd day of May, A. D. 1871, the following proceeding was had, as appears of record, in words and figures following, to wit:

52 THE UNION PACIFIC RAILROAD COMPANY
*vs.*
WILLIAM S. PENISTON, TREASURER LINCOLN CO. } No. 36 B.

The motion of the plaintiff in the above-entitled cause, to continue the injunction heretofore allowed therein, came on to be heard, and was argued by Mr. Poppleton and Mr. Wakely in support thereof, and by Mr. Woolworth in opposition thereto. And the court having considered the same, thereupon it is ordered and decreed that the said injunction be, and the same is hereby, modified, as follows: That as to the sum of $12,000 the said injunction be continued, and as to the remainder of the tax by the said complainant complained of be dissolved.

Thereupon, afterward, at the May term of said court, to wit, on the 5th day of May, A. D. 1871, the following proceeding was had, as appears of record in said cause, in words and figures following, to wit:

*Decree.*

THE UNION PACIFIC RAILROAD COMPANY
*vs.*
WILLIAM S. PENISTON, TREASURER OF Lincoln Co. } No. 36 B.

53 This cause came on to be heard upon the pleadings and stipulations filed herein, and was argued by Mr. Poppleton and Mr. Wakely for the plaintiff, and by Mr. Woolworth for the defendant, and the court being fully advised in the premises, finds that, as to the sum

of twelve thousand eight hundred and eighty dollars of the taxes in the said plaintiff's said bill complained of, the said taxes are illegal, and ought not to be enforced against the said plaintiff, and that, as to the remainder of the said taxes, the same are legal, and ought to have been paid by the said plaintiff.

It is therefore ordered, adjudged, and decreed that the said defendant and his successor or successors in office be, and he and they are hereby, perpetually restrained and enjoined from ever enforcing or in anywise attempting to collect the said sum of $12,880 of the taxes in the said bill complained of, and that as to the remainder of the said taxes, the parties plaintiff and defendant be, and they are, left to the usual process of the revenue laws in that behalf, and in respect thereof the injunction prayed for is denied, and that the said plaintiff pay the costs of this suit to be taxed.

And the said plaintiff prays an appeal to the United States Supreme Court, from this decree, and the said appeal is hereby allowed, and the said defendant also prays an appeal from this decree to said Supreme Court, which is also allowed.

54 UNITED STATES OF AMERICA,
*District of Nebraska, ss:*

I, Watson B. Smith, clerk of the circuit court of the United States for the said district of Nebraska, do hereby certify that the foregoing are true and faithful transcripts from the records and files of said court in the case of the Union Pacific Railroad Company vs. William S. Peniston, treasurer Lincoln County, and the whole thereof.

Witness my hand and the seal of said court, at Omaha, this 25th day of Oct., 1871.

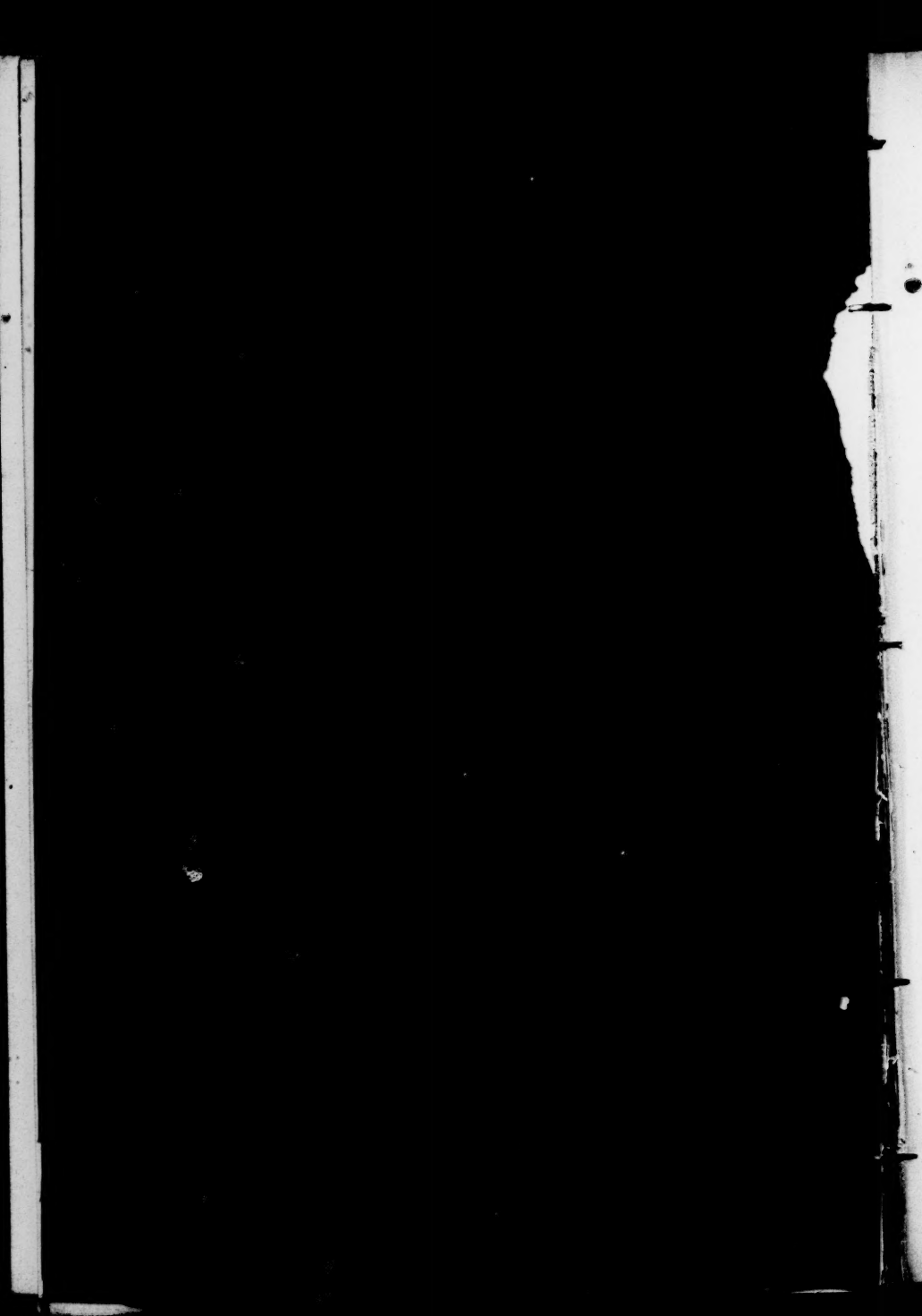
[SEAL.] WATSON B. SMITH, *Clerk.*

Costs of transcript, $13.55, p'd by complainant.

No. 36 B. U. S. circuit court, district of Nebraska. Union Pacific R. Co. vs. William S. Peniston, treasurer Lincoln Co., Nebraska. Transcript in case.

(Indorsement on cover:) No. 496. The Union Pacific Railroad Company, appellant, vs. William S. Peniston, treasurer of Lincoln County. Nebraska C. C. U. S. Filed 7th December, 1871.

REC. 496—3



Evening Post Steam Presses 41 Nassau Street cor Liberty N Y

# Supreme Court

## OF THE UNITED STATES.

THE UNION PACIFIC RAILROAD COMPANY,
Appellant,

*vs.*

WILLIAM S. PENISTON, Treasurer, &c.,
Respondent.

### Brief for Appellant.

### Statement.

Under a Revenue Law of the State of Nebraska, passed February 15th, 1869, the authorities of Lincoln county, of that State, laid a tax upon the property of The Union Pacific Railroad Company, embraced within the taxation, upon the valuation of $16,000 per mile, for a length of two hundred and forty-six miles.

The property of the company thus rated and taxed is given in a schedule at fol. 50 of the record, and

seems to include every description of property within its corporate capacity to own, or constituting any part of its means of operating its road, exercising its franchise, and meeting the public obligations of its charter.

It appeared that the length of the company's road lying within the territory ascribed to Lincoln county for taxation, was as follows: In Lincoln county, eight miles; in Cheyenne county (unorganized), one hundred and five miles; between said counties, sixty-three miles, making a total of one hundred and seventy-six miles, and showing an excessive computation in rating and levying the tax, of seventy miles.

Rec., fol. 47.
" " 45, map.

The Union Pacific Railroad Company filed a bill in the Circuit Court of the United States in the District of Nebraska, to restrain the collection of this tax.

The bill seeks to restrain the collection of the tax for the three following reasons:

1. Because two hundred and forty-six miles of road-bed have been assessed by the authorities of Lincoln county, whereas only one hundred and seventy-six miles of the road-bed are situate in Lincoln county, and the attached territory west of it, to the State line.

2. Because Lincoln county is not by law authorized to tax any portion of the road-bed or property of the defendant, except such as is situate within its geographical limits.

3. Because the State of Nebraska has no power to subject to taxation for State purposes the road-bed, rolling stock, and other property necessary for the use and operation of the complainant's road; such power resting, as it is claimed, exclusively in the Government of the United States.

On the 15th of February, 1869, the Legislature of Nebraska passed an act "to define the western boundary of Lincoln county," and after defining it, the act makes this important provision, to wit: "That all the unorganized country lying west of the western boundary of Lincoln, and east of the east line of Cheyenne county and south of the North Platte river be, and, the same is hereby, attached to the said county of Lincoln, for judicial and revenue purposes, and that the county of Cheyenne be, and the same is hereby, attached, for judicial and revenue purposes, to said county of Lincoln." (Laws of Neb., 1869, p. 249).

This act, as well as the revenue act, before mentioned, was approved on the 15th day of February, 1869, and each went into effect from its passage. The revenue act is as follows:

SEC. 17. The president, secretary, superintendent or other principal accounting office, within the State, at the time of the assessment, of every canal or slack-water navigation company, railroad company, turnpike company, plank-road company, bridge or ferry company, insurance company, telegraph company, or other joint stock company, except banking or other corporations, whose taxation is specially provided for in this chapter, for whatever purpose they may have been created, whether incorporated by any law of this State or not, where any portion of said property, at the time of assessment, is situated in more than one county, shall list for taxation, verified by oath or affirmation of the person so listing, all the personal property, which shall be held to include road-beds, depots, wood and water stations, poles and wires, bridges, boats, books, papers, offices, furniture and fixtures, and such other realty as is necessary for the daily business operations of said road, bridge, insurance or other company or corporation, moneys or credits of such company or corporation within the State, at the actual value in money, in manner following, to wit: "In all

cases, except as hereinafter provided, a full return of all property shall be made to the auditor of State, on or before the first Monday of March, annually, together with a statement of the amount of such property, which is situated in each organized county, precinct or township, incorporated village or city therein. The value of all movable property shall be added to the stationary and fixed property: *provided*, that, whenever the whole of the property of any company, aforesaid, shall be in one county only, the return shall be made to the assessor or assessors, in the same manner as returns of other property are made. If the return, aforesaid, shall not be received by said auditor within three days after the first Monday in March aforesaid, it shall be the duty of the auditor to procure the information aforesaid, in any manner that may appear to be most likely to secure the same correctly, and for that purpose shall address a written request to the officer who has omitted or neglected to make the return aforesaid; and it shall be the duty of the auditor, on or before the first Monday of April, or so soon thereafter as he shall have procured the necessary information, to certify to the county clerks of the several counties in which said property, or any part thereof, sha'l be situated, the amounts thereof, specifying the several amounts included in each organized precinct or township, incorporated city or village, in said county, which amounts, when so received by the several county clerks, shall be placed on the list of taxable property returned to them by the several assessors for such precincts or townships, incorporated cities or villages. The auditor shall certify whether the return was made by the proper officer, or whether the valuation was procured by himself; and it shall be the duty of the county commissioners to equalize the valuation of such property in the same manner as of other property, and if the return has not been made by the proper officer, and at the proper time, as required by this act, it shall be the duty of said county

commissioners to add, not exceeding fifty per cent., to the valuation thus brought before them.

The more material provisions of the Acts of Congress relating to the Union Pacific Railroad Company, are as follows:

The company was incorporated by Act of Congress, of July 1, 1862 (12 Stats. at Large, 489). This act was subsequently amended in some essential particulars, especially by the act of July 2, 1864 (13 *ib.*, 356).

The incorporating statute is entitled "An act to aid in the construction of a railroad and telegraph line from the Mississippi river to the Pacific Ocean, and to secure the government the use of the same for postal, military and other purposes."

By this act Congress incorporated certain individuals, their associates and successors as the "Union Pacific Railroad Company," with authority to build a continuous railroad and telegraph from a point on the one hundredth meridian to the Western boundary of Nevada territory.

It fixed the amount of the capital stock and shares, and declared that "the stockholders should constitute said body politic and corporate." The government has no stock in the road, though it has two directors, not stockholders, out of fifteen directors.

The act grants the company the right of way through the public lands, and "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportion of the mails, troops, munitions of war, and the public stores thereon," makes it an extensive grant of lands, and provides for the issuing of patents therefor.

And for the same purposes the United States agreed to, and did issue its thirty years six per cent. bonds to the company, to the amount of $16,000 per mile, for each section of forty miles; which bonds the original act declared "shall, *ipso facto*, constitute a first mortgage on the whole of the railroad and telegraph, together with the rolling stock, fixtures and property of

every kind," and made specific provision as to proceedings on the failure of the company to redeem the bonds.

By the Act of July 2, 1864, this was changed, and the company authorized to issue its "first mortgage bonds to an amount not exceeding the bonds of the United States," and the lien of the United States bonds was declared to be subordinate to the bonds so issued by the company, with the exception relating to the transportation of dispatches, troops, mails, &c., for the government.

These grants to the company are declared to be "made upon condition (1) that the company shall pay the bonds of the United States at maturity; (2) shall keep their line and road in repair and use; (3) transport mails, troops, &c., giving the government the preference at fair and reasonable rates of compensation, the amount thus earned to be applied in payment of the bonds, as well as five per cent. of the net earnings of the road after its completion. By the 17th section of the act, it is provided, if the road, when finished, is for any unreasonable time permitted to remain out of repair, or unfit for use, Congress is authorized to put the same in repair and use, and reimburse the government for expenditures thus caused, from the income of the road.

The 18th section provides that when the net earnings of the road exceed ten per cent. of its costs, Congress may reduce, fix, and regulate rates of fare thereon, and declares that "the better to accomplish the object of this act, to wit; to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure the government at all times (but particularly in times of war), the use and benefits of the same for postal, military and other purposes; Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

The act also contains provisions that so far as the public and government are concerned, the said railroad and branches shall be operated as one connected and continuous line.

There is no provision in any Act of Congress relating to this company, respecting the taxation of it or its property by the States through which its roads may run.

At the date of the passage of the act incorporating the company, Nebraska was in a territorial condition under the Act of 1854, organizing the territories of Nebraska and Kansas.

In 1867, Nebraska was admitted into the Union "upon an equal footing with the original States, in all respects whatever."

By the enabling Act of Congress of April 10, 1864, Nebraska was required to, and subsequently did in her constitution, disable herself from taxing "lands or property therein belonging to or which may hereafter be purchased by, the United States;" and accordingly her Revenue Laws, in terms, exempt from taxation the property of the United States.

The cause was heard upon pleadings and agreed proofs, and thereupon the Circuit Court decreed a perpetual injunction against the collection of the tax rated to the seventy miles of excessive computation, and refused to restrain the collection of the residue of the tax, holding the same to have been lawfully imposed and the property of the company to be open to State taxation.

It appeared by the pleadings and proofs that the population of Lincoln county and all the attached territory, by the census of 1870, was but 1,352 persons; that the whole amount of the tax list was $4,081,904, of which $3,936,000 was the said property of the company, and only $145,904 the property of other taxpayers.

Record, fols. 7, 10.

The tax levied by the county was $45,264 upon the company's property, and $6,350.45 upon the property of other tax-payers

The tax levied upon the company's property was distributed under the following heads or purposes of taxation (Rec., fols. 7, 10) :

| | |
|---|---|
| For State general fund | $7.872 |
| For State sinking fund | 3,936 |
| For State school fund | 3,936 |
| For county general fund | 19,680 |
| For county sinking fund | 3,936 |
| And for district school purposes | 1,968 |

## Assignment of Errors.

Upon the decree of the court, brought up by this appeal, the following errors are assigned :

*First.*—It was error in the court below to hold the tax a valid imposition upon the property of the Union Pacific Railroad Company subjected to it, such property being exempt from State taxation, by virtue of the incorporation of the company by the United States as a means for the performance of certain public duties of the government, enjoined and authorized by the Constitution.

*Second.*—It was error to hold the rating and taxing of the property of the company, outside the county of Lincoln, by the authorities of that county, valid and lawful under the Legislation of the State.

## POINTS.

**First.**—The tax laid by the County of Lincoln, under the revenue law of the State of Nebraska, upon the property of the Union Pacific Railroad Company subjected to it, is repugnant to the Constitution of the United States, which exempts such property from State taxation.

The tax, therefore, and the statute of Nebraska, so far as it authorized the tax, were void, and the Company's property should have been relieved and protected therefrom, by the judgment of the court.

I. An examination of the Union Pacific Railroad Acts will show, that the company incorporated by Act of Congress to build and operate a railroad through the Territories of the United States, between the western border of Iowa and the eastern border of California, was created and endowed with its franchises, powers and property, as a means, instrument and agency, for the execution of the powers vested in the General Government by the Constitution of the United States.

II. At the time of the passage of the Act of Congress, under which the corporate powers were created and conferred upon this company, the government of the United States exercised the sole and undivided dominion over the territories to be traversed by the railroad, or affected by the powers of this corporation or their administration.

III. The tax authorized by the Statute of Nebraska, and actually laid by the county of Lincoln, is rated and assessed upon whatever constitutes the property and the means of the company as collected, combined, prepared and operated (under or by authority of the Act of Congress) as the instrument and agent of the General Government,

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III. The tax authorized by the Statute of Nebraska, and actually laid by the county of Lincoln, is rated and assessed upon whatever constitutes the property and the means of the company as collected, combined, prepared and operated (under or by authority of the Act of Congress) as the instrument and agent of the General Government,

for the execution of its constitutional powers and the performance of its constitutional duties, so far as this instrument and agent has its structure, capital in any and every form of use or investment, and its operations within the local range of the taxing power.

The theory of the taxation is an apportionment of the total and aggregated means of the corporation per mile of its railroad, and a valuation and taxation of the rateable share of the length of the railroad found within the different counties of the State.

IV.—If the tax be looked at in its circumstances as well as in its principle, it is not too much to say that the introduction and operation of this means and agency of the General Government within the territorial limits of what now constitutes the State of Nebraska, is made the occasion, and the means and agent made the subject, of taxation for local and general State purposes, in exoneration of the property of the population which should bear those burdens.

**Second.**—The settled doctrines of this court, in expounding the relations which the means, instruments and agencies created by the General Government for the execution of its constitutional powers bear to the States, and taxation under the authority of the States, exempt the Union Pacific Railroad Company from the taxation to which it is sought to be subjected.

The *principles* established in the celebrated cases of *McCulloch* vs *Maryland* (4 Wheat., 316), and *Osborn* vs. *Bank of United States* (9 Wheat., 738), stand unbroken and impregnable. Neither the force of their reason,

nor the weight of their authority, is, in the least, abated by any subsequent adjudications *in pari materia*.

Chief Justice Chase thus speaks of these decisions in the case of *Van Allen* vs. *The Assessors* (3 Wall., 591).

"That Congress may constitutionally organize or constitute agencies for carrying into effect the national powers granted by the Constitution; that the agencies may be organized by the voluntary association of individuals, sanctioned by Congress; that Congress may give to such agencies, so organized, corporate unity, permanence and efficiency; and that such agencies in their being, capital, franch ses and operations, are not subject to the taxing power of the States, have ever been regarded, since those decisions, as settled doctrines of this court.

"Those decisions were the judgments of great men and of great judges. They were pronounced by the most illustrious of their number, and are distinguished by his peculiar clearness and cogency of reasoning. For nearly half a century the principles vindicated by them have borne the keen scrutiny of an enlightened profession and the sharp criticism of able statesmen, and they remain unshaken. All the judges who concurred in them have descended long since into honored graves, but their judgments endure, and gathering vigor from time and general consent, have acquired almost the force of constitutional sanctions."

A concise and authoritative statement of what principles were decided in *McCulloch* vs. *Maryland*, and *Osborn* vs. *U. S. Bank*, is given by the Court in its opinion, as delivered by Chief Justice Marshall, in *Weston* vs. *Charleston*, 2 Pet, 466.

"We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was, that all subjects which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are upon the soundest principles, exempt from taxation." "The sovereignty of a

State extends to everything which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by Congress to carry into execution powers conerred on that body by the people of the United States." "The attempt to use the power of taxation on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give." "The States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the General Government."

**Third.**—The adjudications in the "*Bank tax cases*," or the reasoning upon which they rest, do not in the least impair the scope or vigor of these principles and these authorities, in their efficient protection from State taxation, of the means and agencies created by the General Government, in execution of its constitutional powers.

These cases simply hold that it is competent for Congress, in its establishment and arrangement of these means and agencies, to *concede* to the States such measure and modes of taxation, as *Congress* deems consistent with the safety and efficiency of these means and agencies, of executing the powers of the General Government.

This is taxation, not by predominance of State authority, but by favor of Federal submission of the subject to State taxation, upon motives of Federal policy.

But this concession is not a judicial question. The *judicial* conclusion excludes the taxation of the States from the province of Federal means and agencies, and requires the *express* assent of Federal authority, to sup-

port the State taxation, and fix its measure and its modes.

To make the measure or mode of State taxation as allowable or excessive, a *judicial* question, is flatly repugnant to the celebrated decisions of this court above cited, and subversive of their reasoning.

Bank of Com. *vs.* N. Y. City, 2 Black., 620.
Van Allen *vs.* The Assessors, 3 Wall., 592.
The Banks *vs.* The Mayor, 7 Wall., 16.
National Bank *vs.* Commonwealth, 9 Wall., 353.

**Fourth.**—The doctrine of this court, that the adoption by Congress of the aid or operation of *corporations created by the States*, in performing services in connection with the execution of the constitutional power of the Federal Government, (in the absence of all indication on the part of Congress that the State agencies so employed should be exempted, in consequence of such employment, from State taxation), does not exempt such State corporations from State taxation, has no application to the case of this Union Pacific Railroad Company, an incorparation of the General Government under the acts of Congress referred to.

Thomson *vs.* Pacific R. R. Co., 9 Wall., 579.

This decision rests upon the distinction between the case of the *employment* of the State corporation for a Federal service and the creation of a corporation as a Federal means and agency, within the discretion of Congress, for the execution of the Constitutional powers of the General Government.

The court held that, in case of the employment of State corporations by Congress, it was competent for

Congress to "exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them."

The only question, therefore, raised and decided by the court in this case was thus stated by the court: "But can the right of this road to exemption from such taxation be maintained in the absence of any legislation of Congress to that effect?"

The argument, that the doctrine of the court in *McCulloch* vs. *Maryland* exempted the Bank of the United States, with its branches, from taxation by the State of Maryland, although no express exemption was found in the charter, and that under that doctrine a *State corporation*, employed as an agent of the operations of the General Government, was equally exempt, is thus disposed of by the court:

"But it must be remembered that the Bank of the United States was a *corporation created by the United States;* and, as an agent of the Constitutional forms of the Government, was endowed by the act of creation with all its faculties, powers and functions. It did not owe its existence, or any of its qualities, to State Legislation. And its exemption from taxation was put upon this ground."

Thomson *vs.* Pacific R. R., 9 Wall., 589.

And again, "the State tax, held to be repugnant to the Constitution, was imposed directly upon an operation or an instrument of the Government. That such taxes cannot be imposed on the operations of the Government, is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the Government, created by itself for public and constitutional ends."

Ib., p. 590.

And the doctrine of the court is thus expressed: "But it will be safe to conclude, in general, *in refer-*

*ence to persons and State corporations employed in Government service*, that when Congress has not interposed to protect their property from taxation, such taxation is not obnoxious to that objection" (*i. e.*, to the objection that the State taxation is used "to defeat or hinder the operations of the National Government.")

Ib., p. 591.

**Fifth.**—The tax under consideration cannot be pretended to fall within the limitation suggested by the court, in *McCulloch* vs. *Maryland*, and incorporated in the National Bank Act by Congress.

The court say of the exemption asserted, that "it does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State."

The tax of the State of Nebraska is not laid upon the shares of the Union Pacific Railroad Company held by citizens of that State, nor upon the real property of the company, in common with the other real property within the State.

The tax is upon the universal possessions and resources of the company, as collected, combined, prepared and applied, within the State, in the operations of the Government services, for which this instrument was created and endowed by Congress.

This tax, then, in the final proposition of the court, after the statement of the above limitation, "is a tax on the operation of an instrument employed by the

government of the Union, to carry its powers into execution. Such a tax must be unconstitutional."

4 Wheat., 436.

It is not necessary to suggest that the intimated liability of the *real estate* of the bank, to the State taxation, could not, by parity of reason, be held to expose the real estate of a railroad—the very *corpus* of its structure, for the operations of the Government for which the company was created and endowed—to State taxation. The real estate of the bank is, manifestly, referred to as of merely incidental, and not substantial, relation to the public uses of the bank, for which it was created by Congress.

**Sixth.**—Certainly no intendment can be drawn from the absence of any express exclusion of State taxation by the act of Congress, that the exposure of this company to State taxation was contemplated by Congress.

The whole road, to which the act of incorporation applies, was within the Territories of the United States, and there was no State government, whose operation needed to be considered or provided against by Congress.

Manifestly, nothing could have been further from the calculations or expectations of the capitalists who entered into the enterprise proposed to them by the Acts of Congress incorporating and endowing this company, than that their property invested in this National Bank was to be rated and taxed to support the local government of the States that should come into being along its route.

They accepted the established doctrines of this court as possessing, in the language of Ch. J. Chase, "the force of constitutional sanctions."

**Seventh.**—But, if the State act be constitutional, in its application to the property of this company subjected to it, it is submitted that the property *outside of the county of Lincoln*, is not lawfully taxable by the authorities of that county under the laws of the State.

**Last.**—The decree below should be reversed, in so far as it refuses the injunction prayed for, and a perpetual injunction issued to restrain the collection of any part of the tax.

WM. M. EVARTS,
Of Counsel for Appellants.

# SUPREME COURT OF THE UNITED STATES.

No. 51.

THE UNION PACIFIC RAILROAD COMPANY, APPELLANT,

*v*

WILLIAM S. PENISTON, TREASURER OF LINCOLN COUNTY.

ARGUMENT FOR APPELLEE.

G. W. Gray, Printer, Omaha, Neb.

# In the Supreme Court of the United States.

No. 51.

THE UNION PACIFIC RAILROAD COMPANY, APPELLANT,

*v.*

WILLIAM S. PENISTON, TREASURER OF LINCOLN COUNTY.

## ARGUMENT FOR THE APPELLEE.

MAY IT PLEASE THE COURT:

IN this bill, the appellant seeks to restrain the collection of taxes levied by the authorities of the State of Nebraska, and of Lincoln County, upon its road and equipment. The road runs through the County, and thence west, first, through a section of country not formed into a County, and then through Cheyenne County, to the western boundary of the State. It was returned by the General Superintendent of the Company as 246 miles in "Lincoln County and west to the State line." It was admitted that all the proceedings assessing the property, levying the taxes, and enforcing the same, and for equilizing the assessed valuation of the property, were regular in point of form. The objections urged against the taxes are three in number.

1. Only 176 miles of road are in any view of the case taxable. This was admitted by both parties. A deduction was accordingly made by the Circuit Court, and the tax, as to the excess, restrained by its decree, of which the appellee does not complain. So that that question is out of the case.

2. It is farther objected that only 8 miles of road is in Lincoln County, and that there is no provision of law for its authorities taxing what lies in the other sections.

2. It is objected farther, that the property of the Union Pacific Railroad Company is not liable to be taxed by the State or the Counties, because it is an instrumentality of the national government for carrying on its legitimate business.

The objection that so much of the road and equipment as lies in Cheyenne County, and the territory not formed into Counties, is not liable to taxation in Lincoln County, demands but a very few words.

Chapter X of the Revised Statutes of Nebraska, p. 45, provides that "all unorganized counties shall be attached to the nearest organized county directly east of them, for election, judicial, and revenue purposes."

At the foot of page 12 of the record, the law is set forth in full, providing that "all the unorganized territory lying west of the western boundary of said County of Lincoln, as hereinafter provided, and east of the east line of Cheyenne County, and south of the North Platte River, be, and the same is hereby attached to said County of Lincoln, for judicial and revenue purposes, and that the County of Cheyenne be and the same is hereby attached for judicial and revenue purposes."

This law took effect on the 17th day of February, 1869. The tax proceedings complained of began subsequently, as is shown by the return of the General Superintendent, which was not sworn to, and consequently not made until the 3d day of April of that year. This return will be found on pages 19 and 20 of the record.

It is true that Section 17 of the revenue law of the State (R. S., p. 305) provides, that the "return shall be made to the several clerks of the respective Counties where such property may be situated," without provision in terms for unorganized Counties and territory not formed into Counties.

But these acts must be taken together. The case is as if the 17th Section read "return shall be made to the several clerks of the respective organized counties, in which and the unorganized counties and territory attached thereto, such property may be situated." If this be not done, the provision of law attaching unorganized Counties, etc., to other Counties, is inoperative in respect of the property of corporations mentioned in the 17th Section. No where in the revenue law are unorganized Counties in terms mentioned: they are brought within the provisions of that law only be force of Chapter X. And, still farther, the same is true of the jurisdictions of the Courts: they are established in the organized counties only; their jurisdiction is in no instance extended to the unorganized counties and territory, save by the general provision of that Chapter. Justice is administered in that large part of the State only by virtue of that law. The expenses of civil government in that vast region are defrayed from revenues drawn therefrom, only by virtue of that law. In these respects, the construction for which we contend always has obtained, and must obtain. The terms of the Section of the revenue law are the same: organized counties alone are mentioned, because Chapter X brings the unorganized territory within their operation. There is no distinction between the provisions of law defining the jurisdiction of the Courts, and that providing for the revenue.

When making the stipulation to be found on pages 18 and 19, the counsel for the appellant felt the full force of this view, and concluded all question thereon. They then admitted that "the proceedings for assessing the property, and levying the taxes, and to enforce the same, and to equalize the assessed valuation of property, were regular in point of form, and that $16,000 per mile was inserted by the proper officers," which could not have been true, if the authorities of Lincoln County were without jurisdiction. And so, too, the return made by Mr. Snyder, the General Superintendent, to be found on page 19, admits that the territory "west to the State line," which is this section included in Cheyenne

County and the unorganized territory, was to be taxed in Lincoln.

The objection to these taxes that they are imposed upon the appellant, as an agent of the federal government, cannot be supported as an original proposition. We concede the principle that those agencies which Congress has established for the purpose of carrying into execution the powers conferred in the federal constitution, are in no way liable to interference by the States. This Court has reiterated that principle many times, and with great emphasis. It is a principle which retains in harmony the two governments, each sovereign in its sphere, which exist, side by side, in this country. But there is another principle which this Court has as often and as emphatically asserted, and which is equally necessary to the harmonious relations of the State and federal powers. It is, that the taxing power exists in the States unrestricted by the federal constitution or government, except as to the means necessary to the latter, to discharge its functions.

In Nathan v. Louisiana, 8 How., 73, Mr. Justice McLean, speaking for the Court, expresses this doctrine, as follows: "The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the federal government, or cession of jurisdiction for the purposes specified in the constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government; and, as laid down by this Court, it may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the legislature to their constituents.

"If this power of taxation by a State, within its jurisdiction, may be restricted beyond the limits stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. But State power does not rest on a

basis so indefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens are engaged. These are subjects of State regulation and State taxation; and there is no federal power under the constitution which can impair this exercise of State sovereignty."

In Hamilton Company v. Massachusetts, 6 Wall., 632, Mr. Justice Clifford, at page 638, says: "All trades and vocations, by which the citizens acquire a livelihood may also be taxed by the State, for the support of the State government. Power to that effect resides in the State, independent of the federal government, and is wholly unaffected by the fact that the corporation or individual has or has not made investments in federal securities. Unless such be the rule the two systems of government—State and federal—cannot both continue to exist, as the States will be left without any means of support, or of discharging their public obligations."

This matter received very full exposition from Mr. Justice Chase, in Lane County v. Oregon, 7 Wall., 71. He says at page 76: "The people of the United States constitute one nation, under one government; and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government and endowed with all the functions essential to separate and independent existence. The States, disunited, might continue to exist. Without the States in union, there could be no such political body as the United States.

"Both the States and the United States existed before the constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting with ample powers directly upon the citizens instead of the Confederate Government, which acted with powers greatly restricted only upon the States. But in many articles of the constitution, the necessary existence of the States, and within their proper spheres the independent

authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left to them, and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in *The Federalist*, thus: "The federal and State governments are, in fact, but different agents and trustees of the people, constituted with different powers, and designated for different purposes."

"Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It was exercised by the Colonies; and when the Colonies became States, both before and after the formation of the Confederation, it was exercised by the new governments. Under the articles of the Confederation, the government of the United States was limited, in the exercise of this power, tc requisitions upon the States; while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls or duties on imports, or duties on internal production, manufacture or use, was acknowledged to belong exclusively to the States, without any other limitation than that of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government; and, subject to the one prohibition of any tax upon exports, and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports or imports, except for a single purpose, and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business and persons, within their respective limits, their power of taxation remained, and remains entire. It is indeed a concurrent power, and in the case of a tax upon the same subject by

both governments, the claim of the United States, as the supreme authority must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures, to which the States commit the exercise of the power. That discretion is restrained only by the will of the people, expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the constitution which contemplates or authorises any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the States, as the like power within the limits of the constitution is complete in Congress."

Other expressions, equally emphatic and to the same effect, may be found in the opinions of the Judges of this Court.

These two principles are fundamental in our complex system:

1. The taxing power of a State extends to every matter of value within its sovereignty.

2. But that power cannot reach those agencies, which are employed by Congress to carry into execution the powers conferred in the Federal Constitution.

These principles are coefficient. By the one, the just and necessary powers of the States, by the other, the just and necessary powers of the nation, are preserved. But they are not co-ordinate. The first is the rule, the second the exception thereto. It devolves upon those who would withdraw "any property, business, or persons, within their respective limits from the taxing power of the States," to show the same to be within the exception.

But there are many agencies of the Federal Government, which do not enjoy any exemption whatever from taxation by the States. They do not claim such exemption, even

in respect of property which they use when serving the Government.

The steamship on the ocean, which bears the ambassador to a foreign Court, and the dispatches by which the diplomatic intercourse of the nation is guided, are agents of the Government, and discharge most necessary, valuable and efficient service. The railroad companies, in every one of whose trains is a postal car, bearing the orders of the executive to subordinate officers scattered all through the wide country, and by which the domestic policy and operations of the Government are directed, are its agents, also discharging most necessary, valuable and efficient service. The stage coach upon the frontier, taking up and carrying into remote parts these orders, so that from this center the volitions and pulsations are obeyed and felt to the extremities of the land, shares in the vast service of the Republic. And, for all this service, these agents, and ten thousand others like them, are paid by the Government. Not a small proportion of their earnings, and the dividends which they distribute among their stockholders, is derived from the Government. They even pay to the State taxes upon these earnings. They have conveniences for doing this service, used for this service exclusively; the steamship, apartments; the railroad, postal cars; the stage coach, wagons; and they pay taxes thereon; and yet they never claim exemption from State taxes. Or if one of them, the Kansas Pacific Railroad, is any exception, if it has claimed exemption on that ground, it stands solitary and alone in asserting such claim, and it has signally failed in establishing it. Thompson v. Railroad Co., 9 Wall., 579.

But, as all know, there are agencies to which such exemption is conceded. The line of separation is clearly drawn by Chief Justice Marshall, in Osborn v. The United States Bank, 9 Wheat., 738. He says, at page 859: "The foundation of the argument in favor of the right of a State to tax the bank, is laid in the supposed character of that

institution. The argument supposes the corporotion to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great and principal object.

"If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the Government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for a public and national purpose. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies, having no political connection with the government, is admitted; but the bank is not such individual or company. It was not created for its own sake, or for private purpose."

* * * * * *

"Why is it that Congress can incorporate or create a bank? This question was answered in the case of McCulloch v. The State of Maryland. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and

rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates." * * * * * *

"We do not maintain that the corporate character of the bank exempts its operations from the action of State authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed, not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially." * * * *

"The appellants admit that if this faculty be necessary to make the bank a fit instrument for the purposes of the government, Congress possesses the same power to protect the machine in this, as in its direct fiscal operations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are drawn from it might follow. But it is not admitted. The Court has already stated its conviction, that without this capacity to trade with individuals, the bank would be a very defective instrument, when considered with

a single view to its fitness for the purposes of government. On this point the whole argument rests."

From this exposition of the relations and immunities of the agencies of the government, these principles are deducible:

1. A private corporation, whose principal object is individual trade and individual profit, is not exempted from State taxation by the casual circumstance of being employed by the government in the transaction of its fiscal affairs.

2. While it is true that the agent entitled to exemption may transact private business, its capacity so to do, must be an incident to its agency, and be in aid thereof.

3. Its operations in transacting private business, must be necessary to its character and efficiency, as a machine employed by the government.

But it is not all of the property of any agents of the federal government that may be withdrawn from the taxing power of the States. An individual is appointed to a federal office. He thereby becomes an agent of that government: an intelligent, efficient, necessary, responsible agent, to whose whole service that government is entitled. None is more so. And yet he is amenable to State laws: if he violates them he incurs their sanction: if he commits murder he must be imprisoned in the State penitentiary; he must be tried by the State Courts; he must be executed by the State officers. His character as a federal officer can not protect him. However needful his services may be to the federal government, it must forego its claim to them in favor of the State. If an offense be committed against his person, as an individual, his remedy is in the State Courts, under the State laws. The federal authority is impotent to vindicate his rights; his official character does not bring him within the protection of the federal laws. What is true in general, is true of taxation. Upon his property, no matter if without it he cannot dis-

charge his official duties, he must pay the taxes—he must pay his poll, just as much as any private citizen.

And what is true of the individual officer, as an intelligent, efficient, necessary and responsible agent of the federal government, to whose whole, unimpeded, unrestrained service, it is at all times entitled, is equally true of any other agent which it rightly employs to carry out its legitimate functions. Not all of its property is necessarily exempt from taxation. The United States Bank was a fiscal agent of the government; it bore a most intimate relation to that government; no agent can be conceived of more closely connected with the government, in most vital particulars, than was that institution. And, yet, in McCulloch v. Maryland, 4 Wheat., 316, 436, Chief Justice Marshall said: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with other real property within the State." And, again, in Osborn v. The United States Bank, 9 Whea., 738, he said, that the local property of the bank may be taxed by the State, the same as the property of other citizens. So that all of the property of the agent is not necessarily exempt from State taxes.

But there is a position in which the federal officer is entitled to the protection of the federal power. "If, while engaged in the proper discharge of his official duties, he have occasion to deal with a man, who, under a general feeling of hostility to the law of Congress, or of a violent temper which is roused by no fault of the officer, or of a spirit of revenge, makes an assault which results in the death of the officer," the guilty man is amenable to the federal law: he is liable to the sanction which it has denounced. The United States v. Gleason, Mr. Justice Miller's Decisions, 75, 77. So, too, in respect of taxation. While the property of the officer in general is subject to State taxation, his salary is entirely exempt therefrom. Dobbins v. The Commissionors of Erie County, 16 Peters, 435. And the same is true of the corporate agent. If "the tax be upon its operations, and conse-

quently upon the operation of an instrument empowered by the government of the Union, to carry its powers into execution," then the tax is unconstitutional. The reason of the rule marks its limitations. The National Government must be free to use such means as it selects, to carry out its functions. Else it cannot exist. When a State tax impairs the efficiency of any instrumentality which Congress selects to carry out the legitimate purposes of the federal government, it is unconstitutional. When it does not have that effect, it is within the competency of the State to impose it.

Mr. Justice Miller, delivering the unanimous opinion of the Court, in National Bank v. Commonwealth, 9 Wall., 353, 361, put this, with his usual force and directness, thus: "But it is argued that the banks, being instrumentalities of the federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States, and its capital, were held to be exempt from State taxation on the ground here stated; and this principle, laid down in the case of McCulloch v. The State of Maryland, has been repeatedly affirmed by the Court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases, as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States; and it certainly cannot be maintained that banks, or other corporations or instrumentalities of the the government, are to be wholly withdrawn from the operation of State legislation. The most important agents of the federal government are its officers; but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation; a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the federal government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency, in performing the functions by which they were designed to

serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property; and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business, far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State laws. It is only when the State law incapacitates the banks from discharging their duties to the government, that it becomes unconstitutional."

But we may safely go even farther than the learned Justice, who pronounced that judgment. It is believed that no case adjudged by this Court can be found, of a tax on the property of a third party, made use of by the national government, which has been held invalid. By third party, I mean some agency, other than an integral part of the machinery of government. For instance, the Secretery of the Treasury, under authority of law, draws up, signs and sells in the market, a bond of the United States. He acts in his official capacity, not as an agent only, but an active, efficient, responsible part of the government. Every thing he does in connection with the supposed transaction, is beyond the competency of any State to affect in any way whatever.

He, then, does not come within the principle contended for: he is not such third party as was mentioned. This takes out of the rule that class of cases, in which it has been

held that the salary of the federal office-holder is not taxable by the States. Dobbin v. Erie County, 16 Peters, 435.

And, to return to the supposed transaction; the bond which the Secretary issues is the promise of the government directly. As the officer who sends it forth is a part of the government, in the particular instance exercising all of its power, the bond is the act of the government; the immediate, not the mediate, act of the government. It, then, is not within the principle contended for. This takes out of the rule, that class of cases in which it has been held that the securities issued by the government are not taxable. Weston v. Charleston, 2 Peters, 449; The Banks v. Mayor, 7 Wall., 24; Bank v. Supervisor, Id. 28. The tax in question, in McCulloch v. Maryland, and Osborn v. The United States Bank, was upon the operations of that institution, and not upon its property. The Chief Justice expressly stated in the first case, that the judgment did "not extend to a tax paid by the real property of the bank, in common with the other real property within the State. But this is a tax imposed on the *operations* of the bank;" and in the second, he said that "the local property of the bank" may be taxed, but the act of purchasing or conveying articles purchased, "by or on behalf of the government, cannot" be under State control.

And the taxation of the present National Banks has been supported upon the same theory; that it was upon the new use, in the business of banking, to which the federal bonds were put, and not upon the bonds nor upon the banks, that the taxes were imposed. See Van Allen v. The Assessors, 3 Wall., 573.

There are other classes of cases, in which the State power of taxation has been denied, but not upon the ground that the object of the tax was an agency of the government. For instance: The Passenger Cases, 7 How., 283; Crandall v. Nevada, 6 Wall., 36, and all that class proceed upon the notion, that the exaction conflicted with the commercial clause. The Railroad Company v. Jackson, 7 Wall., 262, proceeded on the obvious principle that Pennsylvania could

not tax a railroad in Maryland. The cases determined at the last term of the Court, of the Kansas Pacific, proceeded, not at all upon the claim here made by the appellant, but upon the terms of the land-grant, and the effect of certain reservations therein. The claim was not rested at all upon the principle here under consideration. And so on through all the numerous classes of cases. They have not turned on the question of the agency of the subject of the tax, as made use of by the federal government.

It may be that the language of some of the Judges, and even the reasoning which they have pursued, seem to favor the doctrine of total exemption of the property of an agent of the national government, from State taxes. But, as Mr. Chief Justice Chase said in Thompson v. The Pacific Railroad, these decisions are limited to the cases before the Court.

It is obvious, upon the principle of the cases above cited, that there are agencies of the government, the nature of which places them beyond the reach of the States. Without stopping to define them, we may pass on to say, that there are other agencies of which the same cannot be positively affirmed. For instance, the old Bank, incorporated by Congress for the principal purpose of being the fiscal agent of the government, is, in its operations, by nature, beyond the interference of the States. That is obvious. But there are other agencies, as the new Banks, whose principle business is private, and the public business is an incident thereto which cannot be placed in the same catagory.

As to this latter class, it is not too much to insist that exemption from State regulation should be secured by express direction of Congress: that if Congress does not in terms grant the exemption, the State sovereignty is not displaced.

It can scarcely be useful, as it certainly is not needful to this case, to go through the judgments of the Court, in order to ascertain whether the State power is displaced without a direct enactment of Congress to that effect. There was

a long disagreement between the Judges on this subject. See the License Cases. 5 How., 504.

But in Gilman v. Philadelphia, 3 Wall., 713, Mr. Justice Swayne, delivering the opinion of the Court, assigned as one of the reasons for sustaining the State law, authorising the bridge, against objections that it conflicted with the commercial power of the nation, the fact that " Congress may interpose whenever it shall be deemed necessary by general or special laws," the inference being, that until such interposition, the power of the State must be respected; and in Woodruff v. Parham, 8 Wall., 123, 140, Mr. Justice Miller, also speaking for the Court, pretty clearly intimates the same view.

Now, I submit with great confidence, that an agent, employed by the federal government, to render it a certain service, being at the same time not an integral part of its governmental machinery, as for instance, one of the heads of Department, ought to be held subject to the taxing power of the State, unless Congress shall interpose, and by express provision declare it to be exempt therefrom as an agency of the government. I do not say that such declaration by Congress ought, under all circumstances, to be conclusive of the question. Congress may not be permitted to draw to itself all control of the matter, and thus be able at will to dominate over the States, without regard to the nature of the agency or its service. But, until it does speak, it is reasonable to infer that it makes no claim on its own behalf of the exemption. This consideration derives additional force from the fact that the exemption claimed, is on behalf of the national government—as if the question were between the United States, on the one hand, and the State on the other. Until the former asserts its rights, it is reasonable to suppose that it does not suppose it has any which the State infringes.

Turning, now, from these general considerations to the appellant, we may easily determine whether it is entitled to exemption from State taxation, because it is an agency of the federal government.

I. It is a private corporation, whose principal object is individual trade and individual profit.

True, it is incorporated by Congress. But when regard is had to the circumstances, this fact has no significancy. It was authorised to build a road from the Missouri River to "the western boundary of Nevada Territory." (See Sec. 1, 8 and 14, Act of 1862.) At that time, and when the amendatory Act of 1864 was passed as well, that whole section was territory, not within any State. Again: there was a careful abstinence from the claim of any power to authorise the building of a road within any State. It was important, in order to secure all the advantages of the work, to construct parts of it, and branches of it, in States; but these parts, and those branches, were to be built by State corporations, and not by the appellant.

The Central Pacific, a California corporation, was to build from the Pacific coast, or the head-waters of the Sacramento, to the eastern boundary of California. (See Sec. 9, Act of 1862.) The Leavenworth, Pawnee and Western, a Kansas corporation, was to build from the Missouri, near the Kansas River, to the 100th meridian (Sec. 9). The Hannibal and St. Joseph, a Missouri corporation, with the consent of Kansas, was to build into that State, either under its own franchise, or one derived from Kansas (Sec. 10). And so on. Every mile of road to be built within the limits of any State was to be built by a State corporation. And these several corporations received the same aid in bonds and lands from the United States as the appellant.

It is true, that in one contingency the appellant was authorised to build its road into California. Congress was anxious to secure the earliest possible completion of the work, and put the Companies upon a race of construction: not fixing an arbitrary point of junction, to which one should build from one side and the other from the other, but allowing each to build until it met the road of the other. Consequently it authorised the appellant to build beyond the eastern boundary of California, until the roads should meet and

connect, with the consent of that State. This exception only emphasises the rule.

The power of Congress to incorporate bodies in the Territories, has never been questioned. It rests on the same foundation as that to organize territorial governments. It does not involve the competency of Congress to charter railroads within the States. That question is not here involved; and the expressions of Chief Justice Marshall, in the bank cases, to the effect that the constitutionality of the act could be supported only upon the ground that the bank was a necessary and proper agency of the government, are inapplicable. So that no argument can be drawn from the circumstance that the appellant was incorporated by Congress.

And in Osborn v. The United States Bank, 9 Whea., 738, Judge Marshall, in terms, excludes the notion that it is the corporate character of the bank that exempts its operations from the action of the State authority. He says, at page 863: "If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of these faculties." * *

"Were the Secretary of the Treasury to be authorised by law to appoint agencies throughout the union to perform the public functions of the bank, and to be endowed with its faculties as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor and expenses, the profits of the banking business, instead of other emoluments to be drawn from the Treasury, which banking business was essential to the operations of the government, would each State in the Union possess a right to control these operations? The question on which this right would depend, must always be, are these faculties so essential to the fiscal operations of the government as to authorise Congress to confer them? Let this be admitted, and the question, does the right to

preserve them exist? must always be answered in the affirmative."

And the two bank cases carry us one step farther. The capital of that institution was $35,000,000, divided into 350,000 shares, of which the United States took 70,000 shares, or $7,000,000. It had twenty-five directors, five of whom were appointed by the President on behalf of the United States—3 Statutes at large, 266 and 269. And yet these circumstances were not held to support the claim of exemption, but rather, as the quotations made above show, they were held not to have any influence upon the question. And this was only in pursuance of the general rule, that ownership by the State, or by the United States, of a portion of its stock, does not alter the character of a private corporation. Bank of the United States v. The Planter's Bank of Georgia, 9 Whea., 904.

2. This corporation was formed for private trade and private profit. The service which it renders to the government is only an incident to its general business. Its operations are only accidentally, they are not inseparably connected with those of the government. Between it and the old Bank there is in this respect the widest possible distinction. The Bank, by the system of exchanges which it maintained between different sections of the country, was converted into a convenient agency for transferring the public funds from place to place. Every bill drawn at one branch upon another, transmitted and paid, was an operation, not only of which the government might avail itself, but it increased to a degree the facility of communication which the Treasury had need of. And the necessity to the Treasury of the most facile and certain and efficient means for the transmission of funds, was what justified the incorporation of the Bank. But who shall say this of the appellant: that the running of its daily trains is thus needful or useful to the government?

What are the services required of it by the government? They are stated in Section 6, of the Act of 1862, to be, to

"transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon said railroad for the government." Every grant of land ever made by Congress to a railroad, has provided in the same terms for the same services.

Not to go farther back than 1850, the grant to Illinois, in aid of what became the Illinois Central, contains this clause, "the said railroad and branches shall be and remain a public highway for the use of the United States, free from toll or other charge, upon the transportation of any property or troops of the United States," and "the United States mail shall, at all times, be transported on the said railroad, under the direction of the Post Office Department, at such price as the Congress may by law direct." (9 Statutes at large 467). These exact words are found in the grant to Missouri, for the Hannibal and St. Joseph Railroad (10 St. 9), in that to Arkansas and Missouri (Id. 156), to Minnesota (Id. 302), Iowa, (11 St. 9); Florida and Alabama, (Id. 15); Alabama, (Id. 16 and 18); Louisiana (Id. 19); Wisconsin (Id. 20); Michigan (Id. 22); Mississippi (Id. 30), and so on down to the last act of the kind passed by Congress.

The service stipulated for by Congress, to be rendered by every land-grant railroad in this country, is as large, as necessary, as valuable as that to be rendered by the appellant. And yet, it will not be claimed that all these agencies are rendering this service as the principal part of their business, and rendering only an incidental service to the public. It will not be claimed that their business is "inseparably connected with the operations" of the government as to place them in the category of the bank. No words are necessary to point out the wide difference between the railroad and the bank. It is so obvious, that it strikes the mind at once.

3. Congress has not interposed any claim of exemption on behalf of the government, of the character set up by the appellant. The terms used in the act have not such reach or force. The title of the act is "to aid in the construction of

a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes." The object of the act is declared in Section 18 to be "to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes."

It will be observed that the objects of the act, as here declared, are two-fold; first, to promote the public interest, etc.; and secondly, to secure to the government the use of the road. One of these objects was evidently as prominent in the mind of Congress as the other. And the interests of the public are secured at the same time with those of the government, by more provisions of the acts, than one. For instance, Section 15, of the amendatory Act of 1864, provides that the several Companies shall "operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the government are concerned, as one continuous road." And the circumstances of the appellant's incorporation, are matters of common knowledge. Congress was moved to pass the original act, by the consideration, at the time greatly agitating the public mind, that the Pacific States and Territories, by reason of their separation from the other parts of the country, might follow the example of the Southern States, and seek to withdraw from the Union. To bind those distant parts more closely to the rest, by the iron bands, and by the yet more potent bands of a stimulated and facile commerce, was the argument most pressed upon Congress. Facility in the transportation of the mails, troops and stores of the government, was rather the incident to this broad and patriotic policy. So, that, whether we regard the words of the acts, or the circumstances of their passage, it is incontestibly obvious that those services, on account of which exemption from State taxation is here claimed, must be considered inci-

dental only. Not only, therefore, have we no exemption from State taxation declared in terms, but the very purposes of the act exclude the idea of such an agency of the federal government, as upon the principles which we have explained, is entitled to such exemption.

4. There is nothing in this record to show that the taxes here complained of will interfere with or impair the efficiency of the appellant, in performing the service required of it by the acts. The allegations of the bill in that behalf, are denied in the answer, and are not supported by any proof. And if we look to the effect of taxation generally, upon the services to be rendered, nothing appears at all within the rule as laid down by Mr. Justice Miller, in the National Bank v. The Commonwealth, 9 Wall., 353. Congress gave the corporation power to make contracts, which implies also the power to make debts. A creditor could sue his demand and recover judgment, and, by proper process, enforce it. Undoubtedly the purchaser of the corporate property would take it, subject to all the conditions upon which the corporation holds it. The franchise to own and manage the road, and to take tolls, may be also sold to satisfy the judgment; and this the purchaser would take, subject to the conditions of the original grant, and to its duties and liabilities to the government. These duties and liabilities would be as much interfered with by such judicial process as by sale for taxes: and the supreme rights of the government may as reasonably be interposed in one case as the other. Those rights, however, find their ample protection in the fact, that whether the property remains in the corporation or passes to another, it is bound to those duties and liabilities: that is, as I said a moment ago, the purchaser takes the property, subject to them in both instances. So that the government is served all the same by the purchaser as by the debtor corporation.

5. There is no need of words to show that this tax is upon the property of the corporation and not upon its operations,

and that it is not a constituent element in the government, but a third party made use of by it incidentally to render to it a certain service.

I have now shown that, according to every one of the principles heretofore explained, this corporation is not such an agent of the government as entitles it, by reason of its character as such, to exemption from State taxation.

A private corporation, organized for private trade and private profit, rendering to the government a service incidentally in the course of its private business, and by no means inseparably connected with the governmental operations, not a constituent part of the machinery of the government, but called in to discharge a duty for which it is compensated, not claimed by Congress as an agency entitled to freedom from State control, its efficiency to discharge its duty, not impaired by the taxation complained of, and its property only, and not its operations, subjected to taxes, it must submit in common with all citizens and all corporations, to those reasonable exactions which the State must make, to support the government which gives protection and value to its business and its property. "Any other rule would convert a principle, founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorised and unjustifiable invasion of the rights of the State."

But this case has been substantially decided by this Court.

We have already more than once quoted from the opinion in Osborn v. The United States Bank, the emphatic expression that the circumstance that it was a federal corporation was not material. The question there treated as vital, and alone vital, was, what was the nature of the services required of it by the government.

In Thompson v. The Railroad Company, 9 Wall., 579, the services, duties, liabilities, relations of the Company in question, were all precisely the same as those of this plaintiff. They were all imposed by these same acts we have been considering, in the words of Section 9 of the first, "The

Leavenworth, Pawnee and Western Railroad Company of Kansas, are hereby authorised to construct a railroad and telegraph line * * upon the same terms and conditions, in all respects, as are provided in this act for the construction" of the Union Pacific Railroad. And yet those services, duties, liabilities, relations, grants and subsidies, did not secure the exemption sought. Very true, the opinion of the Chief Justice was carefully confined to a State corporation. But put the case in 9 Whea. with that, and the rule of this case is directly established. The case in 9 Wall. holds that a State corporation, rendering the same services, subject to the same duties and liabilities, sustaining the same relations as this appellant, must pay its State taxes. The case in 9 Whea. holds that a State corporation, and a federal corporation, are on precisely the same footing in these respects. The conclusion covers this appellant.

And, after all, on plain principles, it must be so. Here is a corporation, running the whole length of Nebraska, 450 miles, owning millions of property, conducting an immense and profitable trafic. Every day it appeals to the officers of the State for protection. Every hour and every moment, the august guardianship of the laws hallows from all touch its sacred rights of property and of existence. Why, for this boon—a government—which alone makes its own being possible, should it not contribute its due share and portion?

J. M. WOOLWORTH,

OF COUNSEL FOR APPELLEE.

# United States Supreme Court.

THE UNION PACIFIC RAILROAD COMPANY, *Appellant*,

*vs.*

WILLIAM S. PENISTON, Treasurer, etc.

## APPELLEE'S POINTS.

### I.

The States of this Union possess the power of taxing, with one exception, every article of value within their respective territorial limits,—underived, unlimited, original and sovereign. As the Federal Constitution and Government did not grant it, so they set no bounds to its exercise.

Nathan *vs.* Louisiana; 8 How., 73.
Hamilton Co. *vs.* Mass.; 6 Wall., 632, 638.
Lane Co. *vs.* Oregon; 7 *Ib.*, 71, 76.

### II.

The exception mentioned is, the agencies employed by the Federal Government in conducting its operations. The reason for the exception is, that, otherwise, that Government would be disabled, either wholly or measurably, by this overshadowing power of taxation by the States, from exercising

freely, fully and independently, its powers and functions. The reason for the exception, and the application of the exception, are co-extensive: where the reason fails, the application is impossible.

1. It is not every agency of the general Government which is exempt from State taxation, *e. g.*, the stage coach, the steamer, the State incorporated railroad, the officer: each renders important, constant, efficient service to the Government. All the land-grant railroads of the country have been bound by the acts of Congress to the same duties, liabilities, services, which bind the appellant, and yet they, by common consent, are not exempt from State taxation.

See 9 St. at Large, 467; 10 *Ib.*, 156, 302; 11 *Ib.*, 9–30.

2. Nor is all the property of any agent of the Government exempt from State taxation. Taxation which does not impair its efficiency in serving the Government must be permitted; and taxation of the agent's property, as such, is not within the rule. In fact, none of the cases in which State taxes have been held invalid are where they have been levied on property; but, rather, are where they have been levied upon the operations of the agent in discharging its functions.

McCollough *vs.* Maryland; 4 Whea., 316, 436.
National Bank *vs.* Commonwealth; 9 Wall., 353, 361.

## III.

It thus appearing that it is not every agent of the National Government, nor all of the property of any agent, which is exempt from State taxation, we are to find the test in the character of the services to be rendered, and not arbitrarily in the character of the agent. Chief Justice Marshall, in Osborne *vs.* The United States Bank; 9 Whea., 738, 863, clearly states this to be the true test. The relations of the Bank to the Government were of the most intimate character: it was the fiscal agency of the Treasury through which its

operations were conducted. It is unreasonable to claim that a railroad used no more, and liable to be used no more, than any other land-grant railroad in the country, holds any such relation to the Government.

If we are to look to the service which the appellant renders to the Government, rather than to the factitious circumstance that it is incorporated by Congress, then this case is decided by Thompson *v.* the Railroad, 9 Wall, 586.

It is a private corporation formed for the purposes of private trade and private profit; its relations to the Government are incidental; its duties, services, liabilities thereto are such only as other companies constantly discharge; it predicates its whole right of exemption from State taxation upon the accident of its federal origin. It claims, needs, and cannot subsist without the daily and hourly protection of the State.

## IV.

If these taxes were onerous, they are such only as the appellant voluntarily subjected itself to; they are such as it deemed needless to reduce at the proper time. The circumstances of the taxes here complained of, even if shown in this record to be unequal, as they are not, cannot effect the only question brought here to be answered.

## V.

The laws of Nebraska bring within the jurisdiction of the taxing officers of Lincoln County the territory west thereof to the State line.

J. M. WOOLWORTH,
*Of Counsel for Appellee.*